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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-797

CROWN SIMPSON PULP COMPANY, and
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

v.

DOUGLAS M. COSTLE, Administrator,
Environmental Protection Agency,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Crown Simpson Pulp Company and Louisiana-Pacific Corporation ("petitioners") petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 599 F.2d 897, 13 ERC 1602 (1979). The order deny-

ing petitioners' petition for rehearing and/or rehearing *en banc* (Appendix B, *infra*) is not reported. The decision of the Administrator of the Environmental Protection Agency ("EPA") (Appendix D, *infra*) is reported at 10 ERC 1841 (1977). Since this case was brought on a direct review petition to the court of appeals, there is no district court opinion.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. On October 15, 1979 the court denied a timely petition for rehearing and/or rehearing *en banc* which was sought jointly by petitioners and by the United States on the jurisdictional question raised by this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

This petition presents the question of the appropriate forum for review of the EPA's veto of a permit and variance issued by an authorized state agency under the National Pollutant Discharge Elimination System ("NPDES") established by the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("the Act").

Pursuant to the congressional mandate for immediate, original court of appeals review of EPA decisions on NPDES permit matters, 33 U.S.C. § 1369(b)(1), a number of circuits have ruled that EPA vetoes of state-issued NPDES permits must be reviewed in the courts of appeals, rather than in the district courts. *Republic Steel Corp. v. Costle,* 581 F.2d 1228 (6th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979); *Ford Motor Co. v. EPA,* 567 F.2d 661 (6th Cir. 1977); *Mianus River Pres. Comm. v. EPA,* 541 F.2d 899 (2d Cir. 1976) (dictum). At least one panel of the Ninth Circuit has come to the same conclusion. *Shell Oil Co. v. Train,* 585 F.2d 408 (9th Cir. 1978); *see also, Pacific Legal Foundation v. Costle,*

586 F.2d 650 (9th Cir. 1978), *cert. granted,* 99 S.Ct. 2857 (1979). Despite these rulings, Ninth Circuit panels in the instant case and in *State of Washington v. EPA,* 573 F.2d 583 (9th Cir. 1978), have rejected direct court of appeals review.

The opinion below exacerbates intercircuit and intracircuit conflicts on an important question of federal law with nationwide implications. A similar conflict exists under the direct appellate jurisdictional provisions of the Clean Air Act, 42 U.S.C. § 7607(b)(1), which will be reviewed by this Court in the current term. *PPG Industries, Inc. v. Harrison,* 587 F.2d 237 (5th Cir. 1979), *cert. granted,* No. 78-1918, 48 U.S.L.W. 3186 (1979). The question presented in this case is analogous to the question presented in *Harrison,* to wit: whether the court of appeals has original jurisdiction under Section 509 of the Act, 33 U.S.C. § 1369, to review a final action of the EPA Administrator denying a variance and vetoing an NPDES permit issued by a properly authorized state agency.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. § 1369(b)(1) provides in pertinent part:

> Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

33 U.S.C. § 1369(b)(2) provides:

> Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

33 U.S.C. § 1362 provides in part:

> (11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

40 C.F.R. § 430.72 provides in pertinent part:

> In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. *An individual discharger* or other interested person *may submit evidence* to the Regional Administrator (or *to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information,* the Regional Administrator (or *the State*) *will make a written finding that such factors are or are not fundamentally different for that facility* compared to those specified in the Development Document. *If such fundamentally different factors are found to exist,* the Regional Administrator or *the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein,* to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. (emphasis added).

STATEMENT OF THE CASE

Petitioners operate the only two market bleached kraft pulp mills in the United States which discharge directly into offshore ocean waters. The mills are located on the remote Northern California coast and discharge through deepwater outfall diffuser systems into the Pacific Ocean. The design of the discharge systems was chosen in cooperation with the California State Water Resources Control Board (the "State Board"), and its subordinate Regional Board. The plant and diffuser sites were selected in part (and despite additional costs) because the currents, turbulence and other characteristics of the Pacific Ocean in the area eliminate environmental concerns that may arise from the location of such plants in other areas. The effect of the currents, turbulence and other ocean characteristics also demonstrate the absence of any impact on receiving water quality.

In 1972 Congress extensively revised federal water pollution control requirements in order "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Through extensive amendments to the Act, Congress required industrial dischargers to achieve the best practicable control technology currently available ("BPT") by July 1, 1977. 33 U.S.C. § 1311(b)(1)(A). BPT requirements for particular dischargers are implemented through NPDES permits. 33 U.S.C. § 1342.

Under the Act, EPA issues NPDES permits directly, except in those states where, consistent with congressional policy to preserve the primary responsibilities of states to control water pollution, EPA has approved state administration of the NPDES program. 33 U.S.C. § 1342(b) & (c). As this Court noted in *EPA v. State Water Resources Control Board,* 426 U.S. 200, 209 (1976), California's program was the first to receive EPA approval, and the State Board is the legally authorized entity to issue NPDES permits in California. Pursuant to the statutory scheme, EPA's authority to issue NPDES permits in California has been suspended. 33 U.S.C. § 1342(c). EPA, however, retains authority to review state permits. 33 U.S.C. § 1342(d)(2).

The Act also directed EPA to promulgate nationwide "effluent limitations" for "point sources," 33 U.S.C. § 1311, and to publish "guidelines" for effluent limitations defining BPT for categories of point sources. 33 U.S.C. § 1314(b)(1). Recognizing that implementation of the entire program would be a major undertaking, involving the potential for a case-by-case evaluation, EPA issued generic guideline limitations on an industry-by-industry basis. EPA's methodology was challenged in *E.I. duPont de Nemours & Co. v. Train,* 430 U.S. 112 (1977). This Court upheld EPA's authority to establish generalized BPT effluent guidelines, but only "so long as some allowance is made for variations in individual plants . . . ." *Id.* at 128.*

EPA belatedly published final effluent limitations guidelines for the pulp and paper industry in January, 1977, only six months before the July 1, 1977 BPT deadline. *E.g.,* 40 C.F.R. § 430.72 (1977). These guidelines considered pulp and paper facilities by general classification, without regard to environmental design or location.

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*This Court did not rule on the validity of EPA's variance clause, 430 U.S. at 128, n. 19.

EPA's 1977 guidelines for the pulp and paper industry, however, did contain a generalized variance clause allowing an evaluation, on a case-by-case basis, of the application of the 1977 BPT guidelines for facilities found to be "fundamentally different" from those considered by EPA in the development of the guidelines. *E.g.,* 40 C.F.R. § 430.72 (1977). The authorization to issue variances was specifically granted in the EPA regulation to those states, such as California, which EPA had previously approved to issue NPDES permits directly.

Although granting variance authority to the states, EPA's variance clause failed to articulate satisfactorily the standards to be applied by state permit-issuing authorities in refusing or granting variances. *E.g., Appalachian Power Co. v. Train,* 545 F.2d 1351 (4th Cir. 1976). EPA purported to define variance standards applicable to petitioners (albeit denying them a hearing) in the very opinion of the Administrator denying petitioners' variances in this case. (Appendix D.) *Subsequently,* EPA finally issued additional variance regulations which have never been applied to petitioners' applications. 40 C.F.R. § 125.31 (1979).

The State Board granted NPDES permits to petitioners in March 1977. In addition, at the culmination of extensive evidentiary and administrative proceedings before state agencies,* the State Board unanimously granted variances to petitioners for two effluent parameters – – BOD and pH. BOD is a measure of oxygen depletion from effluent discharges; pH is a measure of acidity and alkalinity. Both parameters are meaningless in the circumstances of petitioners' discharges, as the State Board found. (Appendix E, pp. 59-61). The State Board concluded that few, if any, environmental benefits associated with secondary treatment

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*The arduous course of the proceedings before the state agencies and EPA's lack of diligence therein are described in detail in Appendix D, pp. 27-30 and Appendix E, pp. 55-56.

for BOD and pH would occur if the variances were denied; that substantial environmental and energy costs would unnecessarily and inescapably be imposed by a requirement of full BOD and pH controls; and that it was environmentally counterproductive to impose EPA's BOD and pH guideline limitations.*

At the same time the State Board imposed other stringent and costly limitations. Although it determined that the BOD and pH content of petitioners' discharges did not threaten water quality or the marine environment, the State Board expressly declined to base its decision on that finding. Rather, the State Board weighed all pertinent environmental factors for the mills and concluded that BOD and pH variances were appropriate. (Appendix E, pp. 68-69).

The EPA then took over. It denied petitioners' requests for hearings. On September 15, 1977, the EPA Administrator issued a lengthy opinion, rejecting the variances and permits granted by the State Board. (Appendix D). The Administrator declared, for the first time, that only EPA has final authority to issue variances. In effect, the role of states administering NPDES programs was reduced to a ministerial function, notwithstanding the explicit language of the variance regulation and the expressly-declared congressional policy to preserve the primary responsibility of states in controlling water pollution.

EPA's denial of the variances was predicated on the theory that the State Board granted them solely because petitioners' discharges do not harm water quality (Appendix D, p. 31), even though the

*The undisputed evidence before the state agencies demonstrated, for example, that more pollution effects would be generated from installation of secondary treatment facilities required to meet BOD and pH limitations than without such treatment facilities. For example, installation of secondary treatment facilities would, wholly apart from capital costs of millions of dollars, consume 5,200 tons of chemicals per year per plant, involve a total power use of 148,232,000 KWH annually, and produce substantial quantities of biological sludge and air pollutants. Similarly, the evidence was uncontradicted that no expected environmental benefit would be gained by installation of secondary treatment facilities. (Appendix E, pp. 59-61, 67).

State Board's opinion expressly rejected that approach. (Appendix E, pp. 58-59).

The decision of the Administrator emasculates the concept of a variance and eviscerates the variance clause promulgated for 1977 BPT limitations. More importantly, the decision is environmentally unsound, contravenes the intent of Congress to avoid debiting one environmental account in order to credit another, and subverts the congressional objective of preserving a significant state role in the permit-issuing process. The issues posed on the merits in this case are important. They concern basic legal issues as to whether the role of the states is to be reduced wholly to clerical functions, in contravention of congressional will, and the appropriate scope that must be given to a variance clause in order to preserve the entire statutory scheme. *See* 33 U.S.C. § 1251(b) & (f); 33 U.S.C. § 1342; and *du Pont, supra.*

Petitioners then sought direct review of the Administrator's veto of the variances before the Court of Appeals for the Ninth Circuit on October 5, 1977, relying upon the review provisions set forth in 33 U.S.C. § 1369(b)(1). The EPA also relied upon the same direct review provisions in the jurisdictional section of its brief. That section provides original court of appeals jurisdiction to review a broad range of EPA actions, including action "in approving or promulgating any effluent limitation or other limitation" or "in issuing or denying any permit." 33 U.S.C. § 1369(b)(1)(E) & (F). Although the jurisdictional section, drafted in 1972 before this Court's decision in *duPont, supra* and before the EPA's promulgation of the variance clause, does not expressly refer to variances, there can be little doubt that inclusion of variance denials by EPA is the only correct reading of the statute. The legislative history of the 1977 Amendments makes clear that such coverage was so intended. Senator Muskie, recognized by this Court as "perhaps the Act's primary author," *duPont,*

supra, 430 U.S. at 129, has expressly stated that EPA actions on variances are to be reviewed directly in the courts of appeals:

> Whenever judicial review is sought of the Administrator's action with regard to any modification to or waiver or variance from an effluent limitation, it is expected that such review will be in the courts of appeals pursuant to [33 U.S.C. § 1369].

123 Cong. Rec. S19646 (daily ed. Dec. 15, 1977). The petitioners and the United States have all taken this position in briefs filed in the Ninth Circuit and in oral argument in this case.

By a vote of two to one, the Ninth Circuit panel that heard the case rejected jurisdiction.* The majority rejected the two subsections of 33 U.S.C. § 1369(b)(1), the jurisdictional statute, which had been argued to them. The majority concluded that the effluent limitations contained in petitioners' permits were not *"uniform* effluent limitations *for categories of plants"* and as such were not subject to review under subsection (E), although subsection (E) does not by its terms require such a focus. (Appendix A, p. 9). The panel also rejected jurisdiction under subsection (F) on the ground that the EPA permit vetoes fell outside the coverage of the "issuing or denying" clause (Appendix A, p. 13), despite the explicit language of the EPA decision under review:

> I have been asked to consider the granting of variances from effluent limitations guidelines for two pulp, paper, and paperboard mills located on the Pacific Coast of California. The requests for variances are denied.

*District Judge Renfrew, sitting by designation, nominally voted with the majority. In his separate, concurring opinion, however, he spelled out in detail the jurisdictional error and the exacerbation of circuit court conflicts being created by the majority, as well as the jurisdictional confusion certain to arise. As his opinion indicates, however, Judge Renfrew believed his vote to be mandated by an earlier Ninth Circuit opinion in *State of Washington v. EPA,* 573 F.2d 583 (9th Cir. 1978), which he also concluded was an erroneous decision, in conflict with the body of federal law on the jurisdictional issue.

In re Louisiana Pacific Corp., 10 ERC 1841 (1977) (Decision of the Administrator) (Appendix D, p. 24).

After brushing off the conflicts in other circuits on the jurisdictional issue, and refusing to address the merits before it, the panel suggested that jurisdiction resided in the district court under the Administrative Procedure Act and the general federal question jurisdictional statute. (Appendix A at 13, n. 5).

In response to the court's obviously strained and erroneous opinion, and Judge Renfrew's suggestion, petitioners and the United States filed a joint petition for rehearing and/or rehearing *en banc.* In the joint petition for rehearing and/or rehearing *en banc,* petitioners and the United States described the delay, inconsistencies and confusion created by the opinion below, as well as the frustration of congressional purpose for prompt resolution of issues of substantial environmental importance: "Government and industry alike have a strong interest in clarifying this jurisdictional issue so that interpretation of pollution control requirements can proceed in a timely fashion." Joint Petition for Rehearing and Suggestion for Rehearing *En Banc,* p. 3. Notwithstanding the fact that all parties, including the United States, sought to have the Ninth Circuit accept jurisdiction, the petition for rehearing was denied on October 15, 1979. Petitioners then obtained a stay of mandate from the court of appeals pending petition for certiorari by order dated October 24, 1979. The order further provides that if a petition for a writ of certiorari is filed by November 21, 1979, the stay is to remain in effect pending disposition of the case in this Court.

REASONS FOR GRANTING THE WRIT

The opinion below contravenes the congressional mandate in the Federal Water Pollution Control Act for prompt centralized review in the courts of appeals of those administrative actions

taken by EPA described in 33 U.S.C. § 1369(b)(1)(E) and (F). In refusing to accept jurisdiction below, the Ninth Circuit opinion creates a bifurcated review system which is neither centralized nor prompt. As such, it frustrates the statutory objective of national, uniform review of EPA permit actions. The decision exacerbates the inter-circuit conflicts presently existing on this jurisdiction question, preserves the confusion created by inconsistent rulings within the Ninth Circuit, and represents a retreat from the policies and rationale underlying this Court's decision in *duPont, supra.*

Another major reason for granting the writ is that the question at issue on the merits – – the role of states and the proper scope of the variance clause – – is precisely the type of issue that Congress wanted resolved with quick finality. This case does not involve simply whether two mills get a variance. Rather, the issues are largely policy and legal questions concerning the operation of the variance system. EPA itself recognizes this in its decision, stating that legal, not factual issues, are the only relevant issues. (Appendix D, pp. 26-27). Indeed, given the existence of a voluminous and adequate record before the state agencies, it makes little sense to put the matters before the district court. In fact, no special expertise of the district court is required in this case. Rather it poses important national legal issues clearly designed for court of appeals review.

Lastly, the decision imposes a severe burden on the administration of the Act. With all due respect, it is a step backward in the efficient administration of justice on a uniform national level, and will cause substantial delays and waste of administrative and judicial resources in the implementation of the Federal Water Pollution Control Act. Under these circumstances this Court should exercise its supervisory powers by granting the writ of certiorari as it recently did in a similar jurisdictional context under

the Clean Air Act. *PPG Industries, Inc. v. Harrison,* 587 F.2d 237 (5th Cir. 1979), *cert. granted,* No. 78-1918, 48 U.S.L.W. 3186 (1979).

1. The Ninth Circuit Ruling Creates a Bifurcated Review System in Direct Contravention of Express Congressional Objectives for Uniform, National Review of EPA Actions in the Courts of Appeals.

The review provisions of the Federal Water Pollution Control Act, 33 U.S.C. § 1369(b)(1), emphasize direct review in the courts of appeals of actions by the Administrator in administering the Act and in approving or setting effluent limitations. Subsection (b)(1) provides, in pertinent part:

> Review of the Administrator's action . . . (E) in approving or promulgating any effluent limitation or other limitation under section 1311 . . . , and (F) in issuing or denying any permit under section 1342 . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person.

The congressional preference for direct review in the circuits of EPA actions in administering the NPDES system derived from Congress' concern that judicial review be centralized and expedited and not an impediment to the effective administration of the Act:

> Congress did not intend for the actions of the Administrator to be subjected to the complexities inherent in a system of review divided between different courts. Rather, it appears to have been its desire that administrative actions be reviewable, but in a manner not likely to impede enforcement unduly.

E.I. duPont de Nemours & Co. v Train, 528 F.2d 1136, 1141-42 (4th Cir. 1975), *aff'd,* 430 U.S. 112 (1977).

As the Fourth Circuit also pointed out in *duPont:*

> While there is little legislative history relating to [33 U.S.C. § 1369], it is highly significant that the committee reports make no mention of any division of judicial review. It is clear that the House and Senate conferees disagreed over whether there should be judicial review in the district courts or the courts of appeals. Yet, there is no indication of any compromise agreement providing for divided review of the EPA standards. To the contrary, the Senate appears to have prevailed on this point [in insisting on review in the courts of appeals].

528 F.2d at 1141.

The legislative history of the 1977 Act makes plain Congress' view that the Administrator's actions on variance matters are to be reviewed directly in the courts of appeals. In explaining the actions of the conference on the new variance system for municipal ocean dischargers provided for in the 1977 Act, Senator Muskie stated:

> Whenever judicial review is sought of the Administrator's action with regard to any modification to or waiver or variance from an effluent limitation, it is expected that such review will be in the courts of appeals pursuant to [33 U.S.C. § 1369].

123 Cong.Rec. S19646 (daily ed. Dec. 15, 1977). Since 33 U.S.C. § 1369(b)(1) was not modified by the 1977 Act, Senator Muskie's statements reflect congressional awareness that EPA actions on variances fall under those existing review provisions.

Regardless of whether review in this case falls under subsection (E) or subsection (F), the opinion below rejects jurisdiction under both subsections, and effectively creates a review system bifurcated between federal district courts and courts of appeals. Review of EPA permit actions is bifurcated by the decision in three ways.

1. First, in its discussion of jurisdiction under subsection (E), the majority suggested that if the EPA had *approved* the variances granted by the State Board, that approval would have been directly reviewable in the court of appeals. (Appendix A, p. 5). The EPA's *veto* of the variance, on the other hand, would only be reviewable in the district court according to the decision. Thus, a distinction based upon characterizing the type of EPA action sought to be reviewed results in a dual review system. Yet the substantive basis of that action is virtually identical.

2. Secondly, the opinion also draws an unsound jurisdictional distinction between EPA's *review* of state-granted permits, and EPA's *direct action* on permits in states without approved NPDES programs: "In states where the EPA itself grants all permits, subsection (F) unquestionably provides for direct review." (Appendix A, pp. 10-11). Thus, notwithstanding Congress' intention to create a uniform review system, within the Ninth Circuit and presumably elsewhere, EPA denial of a permit in Alaska, which has no approved state permit-issuing program, would be reviewed by the court of appeals, while EPA veto of a state-granted permit in California under an approved program would be reviewable in the district court.

Yet, the action by EPA under either situation is functionally identical. That Congress established a system whereby either EPA or a state could issue permits reflects a policy decision to preserve a major role for the states in the overall administration of the Act, but by no means does it support a bifurcated review system. Indeed, it is in direct contrast to Congress' overall desire for a unified review system at a single level, regardless of whether the permit-issuing authority was federal or local. Given the role which state agencies have been granted under the Act, it demeans that role to compel review of state permit-issuing actions in fed-

eral district court, while maintaining review of EPA permit-issuing actions in the courts of appeals.

3. Lastly, as petitioners and the United States pointed out in their joint rehearing petition, the Ninth Circuit's opinion creates an even greater threat of bifurcated review in light of the 1977 Amendments to the Federal Water Pollution Control Act. Under the 1977 Amendments, where the Administrator has vetoed a permit and the State does not revise the permit to meet the Administrator's objections, the Administrator may then issue a revised permit. 33 U.S.C. § 1342(d)(4), *as amended by* 91 Stat. 1599. The decision below would make the Administrator's *veto* of the state-granted permit reviewable only in the district court. If, however, EPA vetoed a state-issued permit and later *issued* a revised permit, that "EPA action" is only reviewable in the court of appeals. Similarly, where a variance is vetoed, the regulations provide that the Administrator may "specify other limitations." 40 C.F.R. § 430.72. If EPA specified other limitations they, too, as "EPA action," would clearly be directly reviewable in the courts of appeals under subsection (E). Thus, as the United States pointed out, review of a single permit or variance request involving identical parties and an identical record would be bifurcated, and reviewed in two different forums, even though the substantive actions of the respective agencies, and the substantive law to be applied, are identical. The potential for conflicting results upon review, and the confusion created by such a review system, are not only contrary to the desirability of efficient uniformity in reviewing actions taken under the Act, but also clearly reflect a step backward from the legislative goals.

The net result of the court of appeals decision can only be described as a jurisdictional patchwork. Where EPA vetoes a variance in a state with an approved NPDES program and does not issue its own variance, the decision would place jurisdiction

in the district court. However, "EPA actions" in approving variances, in issuing permits in states without approved NPDES programs, and in granting or denying variances on its own after a veto of a state-granted variance, would all be directly reviewable in the courts of appeals. Petitioners submit that the distinctions drawn by the court of appeals, based upon characterization of the action taken or the identity of the permit-issuing authority, are meaningless and irrelevant. These distinctions are without foundation in the statute, make little sense from the standpoint of judicial efficiency, and frustrate the congressional goal of quick, uniform review of EPA actions on NPDES permits.

Petitioners respectfully submit that the jurisdictional confusion existing in the Ninth Circuit's opinion stems in part from the history of the variance clause. To be sure, 33 U.S.C. § 1369(b)(1) does not use the term "variance." This is scarcely surprising. The 1977 BPT variance mechanism was established by the Administrator long after 33 U.S.C. § 1369(b)(1) was enacted, in order to save a shaky statutory scheme by promulgating generalized effluent guidelines, *e.g.*, 40 C.F.R. § 430.72 – – an approach approved by this Court in *duPont*. The inescapable point is that important actions taken by EPA in setting variance policies – – which is precisely what this case concerns – – are exactly the kinds of issues Congress designed the review provision to cover. No valid reason exists for district court review and no special expertise of the district court is required here. An adequate administrative record was fully developed before the state agencies. EPA reviewed that record and issued a decision based solely on its interpretation of legal issues having critical national importance. The ultimate action to be reviewed is that of the EPA Administrator, which clearly falls within 33 U.S.C. § 1369(b)(1), and the ultimate legal issues are clearly designed by Congress for original court of appeals jurisdiction. Since Congress intended original court of

appeals review of EPA actions, the opinion below is erroneous and should be corrected.

2. The Opinion Below Creates a Conflict Between Circuits and Within the Ninth Circuit on an Issue of National Significance Which Requires Resolution.

The problems created by the Ninth Circuit's jurisdictional patchwork are compounded by the inconsistencies of the opinion with the decisions of other circuits. The opinion diverges radically from other decisions in two important respects. First, it adopts a narrow construction of the categories of reviewable EPA actions contained in 33 U.S.C. § 1369(b)(1), stating that "the courts of appeals have 'strictly construed' these direct review provisions." (Appendix A, p. 5, citing *Pacific Legal Foundation v. Costle, supra,* 586 F.2d at 654.) No other circuit has taken such a narrow view. The decision also conflicts squarely with the opinions of other circuits in terms of the jurisdictional distinctions that it draws.

Two decisions of the Court of Appeals for the Sixth Circuit have found EPA vetoes of state-granted NPDES permits to be directly reviewable under Section 509(b)(1)(F). *Republic Steel Corp. v. Costle,* 581 F.2d 1228 (6th Cir. 1978), *cert. denied* 440 U.S. 909 (1979); *Ford Motor Co. v. EPA,* 567 F.2d 661 (6th Cir. 1977). In *Ford Motor,* the State of Michigan proposed to modify an NPDES permit. The EPA rejected the proposed modifications. *Id.* at 667. The Sixth Circuit held EPA's rejection to be directly reviewable under 33 U.S.C. § 1369(b)(1)(F), as EPA action in issuing or denying a permit. *Id.* at 668. By finding jurisdiction in a situation involving permit *modification,* as opposed to initial issuance of a permit, the Sixth Circuit in *Ford Motor* evidenced a willingness to broadly construe the categories in 33 U.S.C. § 1369(b)(1). By finding jurisdiction to review an EPA veto of a permit proposed by a state with an approved program, the Sixth Circuit's decision directly conflicts with the decision in

this case. *Republic Steel* followed *Ford Motor* in a similar veto situation, expressly recognizing the conflict with the prior Ninth Circuit cases. 581 F.2d at 1230, n. 1. Although dismissed with a passing reference in the Ninth Circuit's opinion, (Appendix A, p. 12), these Sixth Circuit cases create a conflict between circuits on the issue of jurisdiction for review purposes. Because that issue has national importance in light of the congressional purpose for uniform review, this Court should resolve this question by granting certiorari to review the decision below.

The Second Circuit has also stated that EPA permit vetoes would be reviewable in the courts of appeals. In *Mianus River Preservation Committee v. EPA,* 541 F.2d 899 (2d Cir. 1976), the EPA had *refrained* from vetoing a state-issued permit, thereby making the permit issued by the State of Connecticut effective. Thus, the only action on the permit had been that of the state. The court held that EPA's failure to veto was not "action" subject to court of appeals review under 33 U.S.C. § 1369(b)(1)(F). The court stated, however, that had the EPA vetoed the permit, that action would have been reviewable:

> Admittedly, had the Administrator exercised his right of review and rejected the Water Company's permit application, that rejection would clearly be subject to review as "Administrator's action."

541 F.2d at 909 (footnote omitted). This statement of the position of the Second Circuit on the issue also conflicts with the Ninth Circuit decision in this case.

The Court of Appeals for the District of Columbia Circuit has also addressed the question of jurisdiction to review EPA actions on variances. *Weyerhaeuser Co., et al. v. Costle,* 590 F.2d 1011 (D. C. Cir. 1978).That case dealt with variance procedures established by 33 U.S.C. § 1311(c), under which EPA could relax the requirement that sources apply the "best available technology economically achievable" ("BAT") by 1984. *See* 33 U.S.C. § 1311

(b)(2)(A). The court stated that "[t]hese permit related proceedings are also judicially reviewable [in the courts of appeals] under the Act." *Id.* at 1020, citing 33 U.S.C. § 1369(b)(1)(F). Thus, the D.C. Circuit in *Weyerhaeuser* also refused to construe the categories contained in 33 U.S.C. § 1369(b)(1) in an overly literal fashion and further recognized that variances are reviewable under subsection (F).

Petitioner Crown Simpson was a party to that action, and the jurisdictional issue involved here was discussed at oral argument before the District of Columbia Circuit. Judge McGowan's opinion carefully avoided any expression of opinion on the merits of the specific variance involved herein, but recognized that both petitioner and the United States conceded that the Ninth Circuit had jurisdiction to decide the merits of Crown Simpson's variance request. 590 F.2d at 1033, n. 29.

In addition to the conflicts between circuits, the decision in this case conflicts with other decisions of the Ninth Circuit, thereby creating a confusing situation for appellate review.

In *Shell Oil Co. v. Train,* 585 F.2d 408 (9th Cir. 1978), the Ninth Circuit stated that EPA vetoes of state-issued variances *are* reviewable under 33 U.S.C. § 1369(b)(1). In *Shell,* a jurisdictional distinction was drawn by the Court between two EPA actions. The EPA had first *passively* allowed a state to reject a variance request; the court accordingly found that there was no EPA action to review. *Id.* at 411. In the meantime, however, the applicant succeeded in persuading the state to change its mind and obtained a variance, which EPA then vetoed. The panel in *Shell* found the EPA veto "reviewable in this court under 33 U.S.C. § 1369(b)(1)." 585 F.2d at 412. Since *Shell* upheld original court of appeals jurisdiction in circumstances identical to that involved in the instant case, the opinion below creates a square conflict within the Ninth Circuit.

In *Pacific Legal Foundation v. Costle,* 586 F.2d 650 (9th Cir. 1978), *cert. granted,* 99 S.Ct. 2857 (1979) (on other issues), the Ninth Circuit broadly construed the categories in 33 U.S.C. § 1369(b)(1) in upholding original court of appeals jurisdiction to review a novel situation not specifically enumerated in the (b)(1) subsections. In *Pacific Legal Foundation,* the EPA had granted an extension of time to a publicly owned treatment work to meet the secondary treatment requirements contained in 33 U.S.C. § 1311(b)(1)(B). The acceptance of original jurisdiction by the Ninth Circuit in *Pacific Legal Foundation* underlines the error and confusion inherent in the Ninth Circuit ruling in the instant case and the disharmony on the point at issue within the Ninth Circuit.

Because the Ninth Circuit encompasses a large geographical area, including states with EPA approved permit-issuing programs and those without, and because the Ninth Circuit is apparently unable or unwilling to resolve its own internal inconsistencies, this Court should use its supervisory powers to do so.

3. The Ruling Below Contravenes the Policies and Rationale Underlying This Court's Decision in duPont.

In *E. I. duPont de Nemours & Co. v. Train,* 430 U.S. 112, 136 (1977), this Court determined that EPA actions on individual 1984 BAT variances are directly reviewable in the courts of appeals under 33 U.S.C. § 1311(c). This Court rejected a disparate administration of the BAT and BPT requirements, stating that, "Nothing . . . suggests any radical difference in the mechanism used to impose limitations for the 1977 and [1984] deadlines," 430 U.S. at 127. Thus, the Ninth Circuit's opinion, insofar as it compels district court review of 1977 BPT variances, conflicts with the principles of *duPont.**

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*This Court in *duPont* also recognized that it was "unlikely that Congress intended . . . bifurcated review . . . ." 430 U.S. at 128, n. 18.

4. The Decision Below Will Result in Delays in Effectuating the Overall Objectives of the Federal Water Pollution Control Act, Constitutes an Unnecessary Waste of Judicial Resources, and Creates the Risk of Developing Conflicting Legal Review Standards.

One of the principal goals of the Act was prompt implementation of national efforts directed at improving water quality and preventing water pollution through nationally-imposed standards. Uniformity of application, with appropriate variances, can only be achieved by a centralized review system designed to foster such results, which Congress intended and created. The opinion below does nothing to advance those goals and objectives; rather it will result in inordinate delays and an inefficient utilization of judicial resources, to say nothing of the potential conflict and confusion in the application of legal standards which it generates.

For example, it is clearly apparent that delay and waste of judicial resources will result from inter- and intra-circuit conflicts concerning jurisdiction to review EPA permit or variance vetoes. Given the jursidictional uncertainty now present, future petitioners will be clearly compelled to file precautionary, concurrent petitions in both the district courts and the courts of appeals, rather than risk losing the right to review through an improvident choice of forum. Jurisdiction will be contested in each case regardless of where it is filed. Moreover, the choice to petition for review in district court may well preclude a later petition to the court of appeals, since 33 U.S.C. § 1369(b)(1) requires that all appeals to the courts of appeals be filed within 90 days of the Administrator's action. Conversely, EPA actions reviewable under 33 U.S.C. § 1369(b)(1) cannot be challenged in an enforcement proceeding in the district courts. 33 U.S.C. § 1369(b)(2). Thus, an unsuccessful choice of forum may be fatal to a petition for review. The lesson to counsel will be clear -- file early, file often, and contest jurisdiction at all stages -- scarcely conducive to the goals intended by Congress.

The delay created by the opinion below, and its potential for delay in other circuits, is best evidenced by this case. Having spent over three years in developing an administrative record which supports the unanimous state decision to issue permits to petitioners with variances and two years in the court of appeals awaiting a decision on the merits, after full briefing and argument, petitioners are now relegated back to the district court for initial review. They are faced with the further prospect of a subsequent review petition being filed in the Ninth Circuit with respect to a future district court opinion on the same issues which could be decided now by the Ninth Circuit. Sound judicial utilization of resources requires the restoration of the efficiencies discarded in the decision below.

The decision in this case also reflects a disturbing trend on the part of some courts of appeals to strain to find some theory, without basis in statute, which will avoid congressionally-mandated direct review of environmental cases. For example, the Fifth Circuit in *PPG Industries, Inc. v. Harrison,* 587 F.2d 237 (5th Cir. 1979), *cert. granted* 48 U.S.L.W. 3186 (1979), refused to accept direct jurisdiction of a petition to review final EPA action under the Clean Air Act. By its grant of certiorari in the *Harrison* case on October 1, 1979, this Court recognized the importance of the jurisdictional issue in environmental cases. Original court of appeals review of EPA permit actions is provided in both the Clean Air Act and the Federal Water Pollution Control Act. *Compare* 42 U.S.C. § 7607(b)(1) with 33 U.S.C. § 1369(b)(1). The goals of such direct review, which include prompt and uniform resolution of environmental requirements, are identical under both Acts. Thus, the same interests that argued for Supreme Court review in the *Harrison* case apply equally in this case. Congress established a clear review scheme under which pre-enforcement actions are reviewed in the courts of appeals and enforce-

ment actions brought in the district courts. The opinion below destroys that scheme. Accordingly, a clear set of jurisdictional rules is imperative if review of environmental decisions is to proceed in a prompt and consistent manner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 21, 1979

Appendix A

In the

United States Court of Appeals

For the Ninth Circuit

CROWN SIMPSON PULP COMPANY, *Petitioner,* vs. DOUGLAS M. COSTLE (formerly Russell E. Train), As Administrator, Environmental Protection Agency, *Respondent.*	No. 76-3161
LOUISIANA-PACIFIC CORPORATION, *Petitioner,* vs. DOUGLAS M. COSTLE (formerly Russell E. Train), As Administrator, Environmental Protection Agency, *Respondent.*	No. 76-3287
CROWN SIMPSON PULP COMPANY and LOUISIANA-PACIFIC CORPORATION, *Petitioners,* vs. DOUGLAS M. COSTLE, As Administrator, Environmental Protection Agency, *Respondent.*	No. 77-3322 OPINION

Petitions to Review Decisions of the Environmental Protection Agency

Before: DUNIWAY and CHOY, Circuit Judges, and RENFREW,* District Judge

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*The Honorable Charles B. Renfrew, United States District Judge for the Northern District of California, sitting by designation.

DUNIWAY, Circuit Judge:

Petitioners Crown Simpson Pulp Company and Louisiana-Pacific Corporation petition for review of respondent Administrator's action in vetoing pollutant discharge permits that the California State Water Resources Control Board proposed to issue to petitioners pursuant to § 402(b) of the Federal Water Pollution Control Act Amendments of 1972 ("the Act"), 33 U.S.C. § 1342(b). (Unless otherwise indicated, all citations to statutory sections are to sections of the Act as they appear in 33 U.S.C.) We dismiss the petitions for lack of jurisdiction.

I. BACKGROUND

Petitioners operate two bleached kraft pulp mills located on the Pacific coast near Eureka, California, and those mills discharge pollutants into the Pacific Ocean.

Acting pursuant to § 1311, the Administrator of the United States Environmental Protection Agency ("the EPA") has promulgated revised nationally applicable regulations limiting the amounts of pollutants that different types of bleached kraft pulp, paper, and paperboard mills may discharge into navigable waters. See 40 C.F.R. part 430, subparts F-I. His authority to issue such regulations was upheld by the Supreme Court in *E. I. Du Pont de Nemours & Co. v. Train,* 1977, 430 U.S. 112, 136, 97 S. Ct. 965, 51 L.Ed. 2d 204. *See also Weyerhaeuser Co. v. Costle,* D.C. 1978, 191 U.S. App. 309, 590 F.2d 1011. The regulations provide that a discharger may obtain a variance from these effluent limitations if it can show that

> factors relating to the equipment or facilities involved, the process applied or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines.

See, e.g., 40 C.F.R. § § 430.62, 430.72, 430.82, 430.92.

The EPA uses a permit system to enforce the effluent limitations. An industrial discharger must obtain a National Pollutant Discharge Elimination System permit if it wishes to continue releasing pollutants into navigable waters. *See* § 1342; *Shell Oil Co. v. Train,* 9 Cir., 1978, 585 F.2d 408, 410. It can obtain a permit only if it either can comply with the national effluent limitations or get a variance.

In some states, the EPA itself approves all permit applications. *See* § 1342(a). In other states, such as California, the EPA shares its permit granting authority with state officials pursuant to § 1342(b). In such states, state officials initially review a discharger's permit application. If they believe that an applicant qualifies, they notify the Administrator of the EPA that they propose to issue a permit. *See* § 1342(d)(1). The state officials may then issue the permit unless the Administrator objects in writing within ninety days on the ground that the permit falls "outside the guidelines and requirements of . . . Chapter [26]," the "Water Pollution Prevention and Control" portion of the Act. *See* § 1342(d)(2). This power to object in writing gives the EPA Administrator a power to veto permits that state officials propose to issue. *See E. I. Du Pont de Nemours & Co. v. Train, supra,* 430 U.S. at 119, n. 7; *State of Washington v. United States Environmental Protection Agency, (Scott Paper),* 9 Cir., 1978, 573 F.2d 583, 586; *Shell Oil Co. v. Train, supra,* 585 F.2d at 410. If a state does not resubmit an objected to permit, "revised to meet such objection," within certain time limits, the Administrator may himself issue a permit under § 1342(a), as if the applicant operated in a state which had not been authorized to issue permits. *See* § 1342(d)(4).

In these cases, the California Regional Water Resources Board, North Coast Region, first proposed to issue permits to petitioners on August 26, 1976. The permit did not follow the EPA's national effluent limitations. On September 3, 1976, the Director of EPA's

Region IX Enforcement Division[1] vetoed the permits because they did not require petitioners to achieve "effluent limitations based upon [the] best practicable control technology currently available" as required by § 1311(b)(1)(A). Petitioners then sought direct review of the Director's veto in this court in Nos. 76-3161 and 76-3287.

On March 17, 1977, the California State Water Resources Control Board ("the Board") granted the requested variances subject to the approval of the Administrator, and proposed to issue permits based upon those variances. The proposed permits would have allowed the companies to discharge wastes far in excess of the national effluent limitations. On September 15, 1977, the EPA Administrator vetoed the permits because they excused the companies from using the "best practicable control technology currently available" as required by the Act. In the EPA's view, this deficiency placed the permits "outside the guidelines and requirements of [the Act]" within the meaning of § 1342(d)(2). The Administrator's decision is reported as *In re Louisiana-Pacific*, 1977, 10 E.R.C. 1841. Crown Simpson and Louisiana-Pacific then petitioned this court in No. 77-3322 to overturn the Administrator's refusal to approve the state proposed variances.

II. JURISDICTION

Petitioners argue that we have jurisdiction under either subsection (E) or subsection (F) of § 1369(b)(1). The EPA does not argue for jurisdiction under subsection (F), but joins Petitioners in urging us to find jurisdiction under subsection (E). We conclude that we cannot exercise jurisdiction under either subsection (E) or subsection (F), and we dismiss the petitions for lack of jurisdiction.

1. The Administrator delegated his veto power to his regional administrators and directors of enforcement pursuant to 40 C.F.R. §§ 125.5 (a)(4) and 125.5(c). *See Scott Paper, supra*, 573 F.2d at 585, n.3. In this opinion, we treat their actions as the Administrator's.

Section 1369(b)(1) specifies the six circumstances under which "Review of the Administrator's action . . . may be had . . . in the Circuit Court of Appeals. . . ." Two of them are

> action . . .
>
> (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title. . . .

As we noted in *Pacific Legal Foundation v. Costle*, 9 Cir., 1978, 586 F.2d 650, 654, the courts of appeals have "strictly construed" these direct review provisions.

A. *Subsection (E)*

Subsection (E) applies to an "[action] in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316." These requirements are not satisfied here. The Administrator did not "approve" or "promulgate" anything. Instead, he *rejected* a permit proposed by the California Board. And his action was with respect to a permit based upon a questionable variance, not an approval or promulgation of an effluent limitation or other limitation.

Petitioners advance two basic arguments. First, they say that the two vetoes are the functional equivalent of a newly promulgated, generalized regulation governing the granting of variances, and that if the Administrator had formally promulgated such a generalized variance regulation, it would have been directly reviewable by the court of appeals as an "effluent limitation or other limitation" under subsection (E). We can agree that a generalized variance regulation would be an "effluent limitation or other limitation" within the meaning of subsection (E) and thus be directly reviewable in the court of appeals.[2] *See Natural Resources*

2. The variance clause set forth in the regulations is a reviewable effluent limitation. In fact, petitioner Crown Simpson filed a timely application with this court pursuant to subsection (E), to set aside the pulp

Defense Council, Inc. v. E.P.A., 2 Cir., 1976, 537 F.2d 642, 644-45. We cannot, however, accept the premise that the Administrator's vetoing of the two permits was tantamount to the promulgation of a new variance regulation.

We have before us not the establishment of new regulations through an irregular procedure, but simply two individualized adjudications to determine the proper application of already promulgated effluent limitation regulations covering the entire industry. As such, the individualized adjudications are directly reviewable, if at all, only under subsection (F) which provides for direct review of Administrator action granting or denying individual permits.

Recent cases involving EPA Water Pollution Control Act regulations illustrate this dichotomy. Where polluters have challenged the validity of regulations, the Supreme Court and the courts of appeals have based jurisdiction upon subsection (E). *See, e.g., E. I. Du Pont de Nemours v. Train, supra,* 430 U.S. at 115, 124-25, 136, 97 S. Ct. 956; *Virginia Electric & Power Co. v. Costle,* 4 Cir., 1977, 566 F.2d 446, 447, 449-50; *American Paper Ins. v. Train,* 1976, 177 U.S. App. D.C. 181, 189-90; 543 F.2d 328, 336-37; *American Petroleum Inst. v. E.P.A.,* 10 Cir., 1976, 540 F.2d 1023, 1026; *Natural Resources Defense Council, Inc. v. E.P.A., supra,* 537 F.2d at 645; *Hoker Chemicals & Plastics*

industry effluent limitation regulations including the variance clause whose application is at issue here. That generalized challenge to the regulations was eventually transferred to the District of Columbia Circuit which upheld the regulations, including the variance clause. *See Weyerhaeuser Co. v. Costle, supra,* 191 U.S. App. D.C. at 320, 329-339, 590 F.2d at 1022, 1031-1041.

Weyerhaeuser left open the possibility of a subsequent challenge to the variance clause as applied. 590 F.2d at 1033, n.29. We agree that an applicant may raise a challenge to a variance regulation as applied as part of a petition to review an Administrator's veto of a permit based upon a proposed but rejected variance. However, we hold, *infra,* that veto of a state permit is not directly reviewable in this court, but rather is reviewable in the district court. Thus a challenge to a variance regulation as applied in such a case must await a properly brought action in the district court challenging the veto of the permit which contained the variance.

Corp. v. Train, 2 Cir., 1976, 537 F.2d 620, 622, 624, 628; *American Meat Institute v. E.P.A.,* 7 Cir., 1975, 526 F.2d 442, 444, 452; *American Petroleum Inst. v. Train,* 10 Cir., 1975, 526 F.2d 1343, 1345. In contrast, where permit applicants have challenged individual applications of EPA regulations, the courts of appeals have looked to subsection (F) as the possible jurisdictional basis for direct review. *See, e.g., Republic Steel Corp. v. Costle,* 6 Cir., 1978, 581 F.2d 1228, 1230, n.1; *Ford Motor Co. v. E.P.A.,* 6 Cir., 1977, 567 F.2d 661, 668; *Bethlehem Steel Corp. v. Train,* 3 Cir., 1976, 544 F.2d 657, 660; *Sun Enterprises, Ltd. v. Train,* 2 Cir., 1976, 532 F.2d 280, 284, 287. *See also Diamond Shamrock Corp. v. Costle,* 1978, 188 U.S. App. D.C. 407, 410, 580 F.2d 670, 673; *American Petroleum Inst. v. E.P.A., supra,* 540 F.2d at 1026, 1030, 1033. It is true that the vetoes provide a basis for predicting whether the Administrator will veto similar permits in future cases, but almost all administrative decisions have a generalized prospective effect to this extent.

Petitioners also argue that when the Administrator exercised his veto power he did not merely reject a permit because of a dubious variance, but rejected an "effluent limitation" within the meaning of subsection (E). Petitioners rely upon the variance clause in the regulation to convince us that we should equate state granted permits based upon variances with subsection (E) effluent limitations. The clause states:

> On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such factors are found to exist, the Regional Administrator or the State *shall establish* for the discharger *effluent limitations in the NPDES permit* either more or less stringent than the limitations established

herein to the extent dictated by such fundamentally different factors. 40 C.F.R. § 430.72 (emphasis added).[3]

While the regulation does appear to support petitioners' argument, we cannot accept their analysis for two reasons. First, even if a permit based upon a variance amounted to a subsection (E) "effluent limitation," subsection (E) requires "administrator's action . . . approving or promulgating" an effluent limitation. Here the Administrator *rejected* the alleged effluent limitation.

Second, despite the isolated language of the regulation, a permit based upon a variance is simply not an "effluent limitation or other limitation under sections 1311, 1312, or 1316" within the meaning of subsection (E). A variance does serve to limit the discharge of effluents. However, the phrase "effluent limitation . . . under section 1311, 1312 or 1316" is a term of art in the context of the Federal Water Pollution Control Act Amendments. Such an effluent limitation is a set of standards restricting the quantities of pollutants that enterprises in a given industry may discharge. *See, e.g., E. I. Du Pont de Nemours & Co. v. Train, supra,* 430 U.S. 112, 126-137, 97 S. Ct. 965, 51 L.Ed. 2d 204; *Scott Paper, supra,* 573 F.2d at 591-92; *Natural Resources Defense Council, Inc. v. E.P.A., supra,* 537 F.2d at 645; S. Rep. No. 92-414, 92nd Cong., 1st Sess. 50-51 (1971) U.S. Code Cong. & Admin. News 1972, p. 3668 reprinted in Senate Committee on Public Works, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. 1468-1469 (1973) (hereafter "Leg. Hist."). Most factories and other point sources within a sub-category of an industry employ similar industrial processes, and so are generally able to limit their discharges to amounts which fall within those effluent limitations by adopting the best practically available pollution control technology. As the Supreme Court phrased it in *E. I. Du Pont de Nemours & Co. v. Train, supra,* effluent limitations are sets of "regulations setting forth uniform effluent limitations for categories of plants." 430 U.S. at 136, 97 S. Ct. at 979.

Because such generalized effluent limitations may affect dozens or even hundreds of plants, it is understandable that Congress made the approval or promulgation of such effluent limitations directly reviewable in the courts of appeals. *See Virginia Electric & Power Co. v. Costle, supra,* 566 F.2d at 451. The two permits and variances at issue here have no similarly far reaching implications. Petitioners themselves assert that their two mills are the only bleached kraft pulp mills in the United States which discharge into open ocean waters, and argue that the proposed variances are valid for that reason. Petitioners' brief at 9.

In arguing that the rejections of the proposed variances did establish effluent limitations, petitioners correctly point out that the Administrator in part derives his power to approve and reject state proposed variances from his own implied authority to issue variances from the 1977 as well as the 1983 effluent limitations. His authority to issue variances from the 1977 limitations in turn is based in part upon his authority to promulgate effluent guidelines and limitations pursuant to sections 1311 and 1314, *See du Pont, supra,* 430 U.S. at 128, 97 S. Ct. 965; *Weyerhaeuser, supra,* 590 F.2d at 1031-1032.

Nevertheless, the fact that the Administrator's power to reject state proposed variances ultimately derives in part from his power to promulgate effluent limitations does not transform his rejection

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3. The variance clause also provides that
Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, *specify other limitations* or initiate proceedings to revise these regulations.
(emphasis added)

Here, the Administrator has not taken the initiative to "specify other limitations" by himself granting a less lenient variance. We thus need not decide whether the direct granting of such an alternative variance would be directly reviewable under subsection (E) as a limitation pursuant to § 1311(c).

of state proposed variances for particular plants into the promulgation of effluent limitations. Subsection (E) provides for direct review of the promulgation of effluent limitations, not for direct review of all of the Administrator's actions that may in any way be dependent upon the Administrator's power to promulgate such limitations.

The very idea of a variance also cuts against treating a permit based on a variance as establishing a new effluent limitation rather than simply an exception to an existing limitation. In another context, the District of Columbia Circuit broadly analogized one of the Act's variance provisions to the variance clauses typically contained in local zoning ordinances. *See Weyerhaeuser, supra,* 590 F.2d at 1034, n.31. When a town board grants an individual zoning variance, that does not mean that it establishes a new zoning ordinance. When an effluent permit issuing authority grants a variance, it does no more than vary the application of an otherwise uniform effluent limitation.

Because the Administrator has not here promulgated or approved any effluent limitation or other limitation under § 1311, § 1312, or § 1316, direct review is not available in this court pursuant to subsection (E) of § 1369(b)(1).[4] *But cf. Weyerhaeuser v. Costle, supra,* 590 F.2d at 1033, n.29.

B. *Subsection (F).*

Subsection (F) of § 1369(b)(1) provides for direct review in the courts of appeals of an EPA Administrator's action "in issuing or denying any permit under Section 1342 of this title. . . ." In

4. We are aware that the language of the second paragraph of Part II of the Supreme Court's opinion in *du Pont, supra,* may suggest that if the Administrator grants or *denies* a variance under § 1311(c), his action is reviewable in the court of appeals under subsection (E), as the "approving or promulgating [of an] . . . other limitation under section 301. . . ." *See* 430 U.S. at 136, 97 S. Ct. at 979. In part II (B) of this opinion *infra,* we explain why we do not equate an Administrator's action in vetoing or failing to object to a state proposed permit with the Administrator's grant

states where the EPA itself grants all permits, subsection (F) unquestionably provides for direct review. However, petitioners operate their mills in California, and as we have seen, California has received the Administrator's approval to administer its own permit issuance program pursuant to § 1342(b). That provision thus limited the Administrator's role in this case to vetoing the permit by objecting to it in writing within the ninety days, or doing nothing for ninety days, in which case the state could proceed to issue the permit, or waiving the ninety-day objection period, thus enabling the state to issue the permit immediately. *See* § 1342(d)(3).

In the cases at bar, the Administrator took the position that all variances required his express approval. He then refused to approve the state proposed variances on their merits, and consequently objected to the permits. Petitioners argue that the Administrator's course of conduct thus constituted "action . . . denying [a] permit" within the meaning of subsection (F), because his actions prevented the state from issuing the permits. In *Scott Paper, supra,* we rejected precisely this argument. There, the Administrator vetoed a discharge permit issued to another pulp and paper company by a Washington state agency because the permit did not require the "best practicable control technology currently available," 573 F.2d at 587. Like the California Board, the Washington state agency had been authorized to administer the permit granting program for the state of Washington pur-

or denial of a permit within the meaning of § 1369(b)(1)(F). For the same reasons, we would not equate an Administrator's action in approving, rejecting, or failing to object to a state proposed variance with granting or denying a variance within the meaning of § 1311(c). In the absence of any direct granting or denying under § 1311(c), the possible reviewability of the Administrator's action under that section cannot provide us with subsection (E) jurisdiction to reach the merits. *But see Shell Oil Co. v. Train, supra,* 585 F.2d at 412 (*dictum*). In any event, § 1311(c) only applies to permit applications "filed after July 1, 1977." Petitioners' applications were filed with the California Water Resources Control Board in 1976.

suant to § 1342(b). On the basis of the "clear and unmistakable" language of the statute, 573 F.2d at 587, we held that subsection (F) "is limited to the Administrator and to his own action in issuing or denying a permit, not to his objection to a state's action in doing so." 573 F.2d at 586. We held that the Administrator's limited involvement did not give rise to an agency relationship sufficient to bring the Administrator's actions within the "issuing or denying" clause of subsection (F). *Ibid*; *Accord, Shell Oil Co. v. Train, supra*, 583 F.2d at 412. Our *Scott Paper* decision is directly in point, and controls our decision here, and we hold that we do not have jurisdiction to review the Administrator's action pursuant to § 1369(b)(1). *Cf. also Save the Bay, Inc. v. Administrator of the Environmental Protection Agency*, 5 Cir., 1977, 556 F.2d 1282, 1290-1292. *But see Shell Oil Co. v. Train, supra*, 585 F.2d at 412 (*dicta*).

We decline to ask the court to take this case *in banc* to consider overruling *Scott Paper*. The Sixth Circuit's recent opinion in *Republic Steel Corp. v. Costle, supra*, 581 F.2d at 1230, n.1, has not persuaded us that *Scott Paper* was wrongly decided. The case simply included a footnote which acknowledged the holding of *Scott Paper*, and announced that the Sixth Circuit would continue to follow its earlier decision in *Ford Motor Co. v. E.P.A., supra*, 567 F.2d at 668.

Decided before *Scott Paper, Ford Motor Company* explained that the factual record in that case "ha[d] been sufficiently developed" to enable the circuit court to "review adequately the action of [the] E.P.A." in objecting to a state issued permit modification. 567 F.2d at 661, 668. The Fifth Circuit had earlier relied upon the inadequacy of an administrative record in refusing to hear direct petitions under subsection (F) in cases where the record contained no more than the absence of any objection on the part of the Administrator, and thus did not "reveal what factors were considered by E.P.A. in determining not to object. . . ." *Save the Bay, Inc. v. Administrator of E.P.A., supra*, 556 F.2d at 1292.

We need not, and do not, evaluate the adequacy of the administrative record in the cases before us, because *Scott Paper* did not hold that this court lacked jurisdiction because of the absence of a record. Rather, it relied upon the language of subsection (F) which it read as requiring the Administrator himself to have issued or denied the permit. While the impossibility of meaningful direct review does weigh decisively against construing a statute as dispensing with initial district court consideration, the mere feasibility of direct review by itself provides little warrant for disregarding the otherwise plain language of the jurisdictional statute.

In *Mianus River Preservation Commission v. EPA*, 2 Cir., 1976, 541 F.2d 899, 909, the Second Circuit held itself without jurisdiction under subsection (F) to review the Administrator's failure to object to a state proposed permit. It based that decision on its view that a failure to object does not constitute an "Administrator's action" within the meaning of the direct review provision. In *dicta*, it did go on to state that a § 1342(d)(2)(B) objection "would clearly be subject to review as 'Administrator's action.'" 541 F.2d at 909. We fully agree that the Administrator's vetoes in the cases before us amount to "Administrator's action" within the meaning of the opening phrase of § 1369(b)(1). However, as discussed above, only six categories of "Administrator's action" are subject to direct review. We simply do not believe that the Administrator's objections equal "denying [a] permit" within the meaning of subsection (F). Because the *Mianus* dicta did not address this second question, it cannot persuade us that *Scott Paper* was wrongly decided.

Our decision does not leave petitioners without a federal forum in which to challenge the Administrator's veto. Under *Scott Paper, supra*, the district court would have jurisdiction to hear such a challenge. *See* 573 F.2d at 587-88.[5]

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5. *Scott Paper* appears to have held district court jurisdiction available under Section 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701-706. See 573 F.2d at 588, 590. While *Califano v. Sanders*, 1977, 430 U.S.

We recognize that under our decisions, whether a disappointed permit applicant must seek judicial review in the district court or in the court of appeals will depend upon whether the applicant operates in a state which has taken on primary permit issuing responsibility under § 1342(b). It does not strike us as at all incongruous that Congress would limit our direct review to states in which the EPA alone handles the permit process.

The administration of the Act has already required the processing of over 42,000 permit applications. *See du Pont, supra,* 430 U.S. at 132, 97 S. Ct. 965. Because each application raises the possibility of a separate lawsuit, it seems quite reasonable that Congress may have intended to divide the burden of this potentially staggering new caseload between the district courts and the courts of appeals. *Compare du Pont, supra,* 430 U.S. at 127-28, n. 18, 97 S. Ct. 965.

Nor will our decision undercut Congress' intention ". . . that the discharge of pollutants into the navigable waters be eliminated . . ." as quickly as possible. *See* § 1251(a). We do anticipate that some district court decisions upholding vetoes of state proposed permits will be appealed to this court pursuant to 28 U.S.C. § 1291. It is thus fair to say that our decision will create a second level of review. Nevertheless, this second level of review will not automatically lead to further delays in the implementation of effluent limitations, if we give careful attention to Congress' sense of urgency when passing upon applications for stays pending appeal.

99, 97 S. Ct. 980, 51 L.Ed. 2d 192, held that the APA is not an implied grant of federal subject matter jurisdiction, the *Scott Paper* rationale just as strongly supports holding jurisdiction available under 28 U.S.C. § 1331(a). *See Andrus v. Charlestone Stone Products Co.,* 1978, 436 U.S. 604, 607-608 n. 6, 98 S.Ct. 2002, 56 L.Ed. 2d 570; *Laden v. Andrus,* 9 Cir., 1978, 595 F.2d 482, 484 (1979). *See also Shell Oil Co. v. Train, supra,* 585 F.2d at 419-20 (dissenting opinion).

Because we lack subject matter jurisdiction, we dismiss the petitions for review.

Crown Simpson Pulp Company v. Costle—Nos. 76-3161, 76-3287 and 77-3322 RENFREW, District Judge (Concurring)

I concur. I am in total agreement that subsection (E) of 33 U.S.C. § 1369(b)(1) does not give this Court jurisdiction. Judge Duniway's thoughtful analysis makes this result abundantly clear. In addition, I agree that the question of our jurisdiction under subsection (F) is controlled by *Scott Paper.* However, I believe that that case was wrongly decided, and I therefore urge the Court to take the present case *en banc* to consider overruling *Scott Paper.*

Section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), vests the courts of appeals with jurisdiction to review the action of the Administrator "in issuing or denying any [NPDES] permit". In those states that do not administer their own NPDES permit system pursuant to 33 U.S.C. § 1342(b) this provision is easily applied. Since the Administrator is directly responsible for issuing or denying the requested permits, his action, whether affirmative or negative, is immediately subject to review by the courts of appeals. However, in states such as California and Washington that have received EPA approval to administer their own NPDES programs, application of subsection (F) is not as clear. In those states the Administrator does not issue or deny permits directly. Rather, he either "objects in writing to the issuance of such permit," or, by his inaction for a period of 90 days, approves the state's issuance. 33 U.S.C. § 1342(d)(2)(B).

The issue in *Scott Paper,* as in the case before us, was whether the EPA Administrator's written objection to a state-issued permit constituted "action * * * denying any permit" under subsection (F). The Court in *Scott Paper* held that it did not. I do not believe this was the proper result.

One of Congress' stated goals in enacting the Federal Water Pollution Control Act was to eliminate the discharge of pollutants into this country's navigable waters by 1985. *See* 33 U.S.C. § 1251(a)(1). Recognizing that a two-tiered level of judicial review might threaten realization of this goal, Congress vested the courts of appeals with jurisdiction to review many of the actions of the Administrator directly. As the Court of Appeals for the Second Circuit has noted:

> "The fact that judicial review of the actions covered by § 1369(b)(1) is in the Court of Appeals in the first instance evidences a purpose, *inter alia*, to save procedural steps and time. After the EPA has completed its administrative proceeding and either denied or issued a permit, to allow challenges to its jurisdiction then to be heard first in the district court would merely cause duplication and delay." *Central Hudson Gas, Etc. v. United States E.P.A.*, 587 F.2d 549, 557 (2d Cir. 1978) (footnote omitted).

See also DuPont v. Train, 528 F.2d 1136, 1141-1142 (4th Cir. 1975) *aff'd*, 430 U.S. 112, 97 S. Ct. 965, 51 L.Ed. 2d 204 (1977).

Congress' goal of ensuring prompt resolution of challenges to the Administrator's actions can best be realized by interpreting "denying [a] permit" to include "object[ing] in writing." This result would be consistent with Congressional goals. It would vest the courts of appeals with jurisdiction over the Administrator's "vetoes" in states that administer their own NPDES permit programs as well as in states that do not. Moreover, it would recognize that the functional effect of an administrative veto is that the requested NPDES permit is denied. *See* 33 U.S.C. § 1342 (d)(2)(B) ("*No permit shall issue* * * * if the Administrator objects in writing * * *.") (emphasis added).

Of course, it would not be appropriate to vest jurisdiction in the courts of appeals if the administrative record resulting from the Administrator's action were insufficient or inadequate for review.

However, while the incompleteness of the record might be a reason for withholding jurisdiction from the courts of appeals over cases in which the Administrator *approved* a state-issued permit—a process that requires no more than silent acquiescence for the 90-day statutory period—it is not a reason for withholding jurisdiction over cases in which the Administrator *filed a written objection* to a state-issued permit. The administrative record is more complete, and therefore more susceptible to appellate review, in the latter group of cases.[1]

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1. Once the Administrator files his written objection, the administrative record is certainly sufficient for the courts of appeals to review. At a minimum, it contains a copy of the proposed permit, a

> "statement of the reasons for the objection (including the section of the Act or regulations that support the objection), and
>
> "[A statement of the] actions that must be taken by the Director in order to eliminate the objection (including the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator)." 40 C.F.R. §§ 124.47(a), 124.48(a)(2).

Also, unless the Regional Administrator of the EPA expressly waives his right to receive the following information pursuant to 40 C.F.R. § 124.47(e), the administrative record will contain

> "all terms, conditions, requirements or documents that are a part of any proposed permit or that affect the authorization by the proposed permit of the discharge of pollutants [as well as] a copy of any significant comments presented in writing pursuant to the public notice and a summary of any significant comments presented at any hearing, for any NPDES application if:
>
> "(1) The Regional Administrator requests this information; or
>
> "(2) The proposed permit contains requirements different from or less stringent than those contained in the tentative determination and draft permit; or
>
> "(3) Significant comments adverse to the tentative determination and draft permit have been presented at the hearing or in writing pursuant to the public notice." 40 C.F.R. § 124.47(b), (c).

Moreover,

> "[f]or every discharge which has a total volume of more than 500,000 gallons on any day of the year, [the administrative record will contain a fact sheet]. The contents of such fact sheets shall include at least the following information * * *:
>
> "(1) A sketch or detailed description of the location of the discharge described in the NPDES application;

The two cases relied upon by this Court in *Scott Paper* support this position.[2] In *Save the Bay, Inc. v. Administrator of E.P.A.*, 556 F.2d 1282 (5th Cir.), *rehearing denied*, 560 F.2d 1023 (1977), the Fifth Circuit held that it had no jurisdiction under subsection (F) to review the Administrator's failure to object to a state-issued permit. In reaching this conclusion, the Court was influenced by the inadequacy of the administrative record.

> "The administrative record here is wholly inadequate to reveal what factors were considered by EPA in determining not to object * * *. * * * When Congress has vested this court with original review, it generally has done so in relation to an administrative process that more easily lends itself to production of a reviewable record." 556 F.2d at 1292.

"(2) A quantitative description of the discharge described in the NPDES application which includes at least the following:

"(i) The rate or frequency of the proposed discharge; if the discharge is continuous, the average daily flow in gallons per day or million gallons per day;

"(ii) For thermal discharges subject to limitation under the Act, the average summer and winter temperatures in degrees Fahrenheit; and

"(iii) The average daily discharge in pounds per day of any pollutants which are present in significant quantities or which are subject to limitations or prohibition under sections 301, 302, 306, or 307 of the Act and regulations published thereunder;

"(3) The tentative determinations required under § 124.31;

"(4) A brief citation, including a brief identification of the uses for which the receiving waters have been classified, of the water quality standards and effluent standards and limitations applied to the proposed discharge; and

"(5) A fuller description of the procedures for the formulation of final determinations than that given in the public notice including:

"(i) The 30-day comment period required by § 124.32(b);

"(ii) Procedures for requesting a public hearing and the nature thereof; and

"(iii) Any other procedures by which the public may participate in the formulation of the final determinations." 40 C.F.R. § 124.33; *see* 40 C.F.R. § 124.48(c)(1).

Finally, if the Regional Administrator had been unable to decide whether to object because the information before him was inadequate, he could have supplemented the administrative record with "the complete record of the permit proceedings before the State." 40 C.F.R. § 124.48(c)(2).

2. *See State of Washington v. United States Environmental Protection Agency*, 573 F.2d 583, 587 (9th Cir. 1978) (*Scott Paper*)

When the Administrator vetoes a state-issued permit, as in *Scott Paper* and the case before us, however, he creates an administrative record. Therefore, the reasoning behind the Fifth Circuit's opinion is not applicable. It is perhaps in recognition of this distinction that the Court stated:

> "We note that by our decision we suggest no answer to the question whether a veto by EPA would be reviewable directly in this Court." 556 F.2d at 1292 n.13.

The Court of Appeals for the Second Circuit employed a similar analysis in *Mianus River Pres. Comm. v. Administrator*, 541 F.2d 899 (2nd Cir. 1976). Like the Court of Appeals for the Fifth Circuit, it declined to assert subsection (F) jurisdiction over the Administrator's failure to veto a state-issued permit. However, it made even more explicit the distinction between inaction and veto:

> "Admittedly, had the Administrator exercised his right of review and rejected the Water Company's permit application, that rejection would clearly be subject to review as 'Administrator's action.'" 541 F.2d at 909 (footnote omitted).

In addition to the cases cited in *Scott Paper*, I obtain support for my position in two cases arising in the Sixth Circuit, *Republic Steel Corp. v. Costle*, 581 F.2d 1228 (6th Cir. 1978), and *Ford Motor Co. v. E.P.A.*, 567 F.2d 661 (6th Cir. 1977). Both of these cases specifically held that subsection (F) *does* vest the courts of appeals with jurisdiction to review the Administrator's written objection to state-issued permits. In *Ford Motor Co.*, the court indicated that one of its bases for decision was that "[t]he factual record in this case has been sufficiently developed that this Court

can review adequately the action of EPA." 567 F.2d at 668. Moreover, in *Republic Steel* the court not only rejected the analysis in *Scott Paper*, but also cited in support of its contrary result the *Mianus River* decision discussed above. 581 F.2d at 1230 n.1.

Somewhat ironically, the *Scott Paper* decision itself underscores the need for immediate appellate review of the Administrator's vetoes of state-issued NPDES permits. In *Scott Paper*, after the panel concluded that it lacked subject matter jurisdiction under subsection (F) to review Scott Paper's petition, 573 F.2d at 587, it made the remarkable statement:

> "Although we hold that the district court has jurisdiction to entertain Scott's challenge to the Administrator's objection to the Anacortes permit, we need not, in light of the record before us, remand the case for additional proceedings. That course is made unnecessary by the presence of a dispositive legal issue which we resolve in the interests of judicial economy. *Cf. Save the Bay, Inc. v. Administrator of E.P.A., supra,* 556 F.2d at 1292." *Id.* at 588.

Considerations of "judicial economy" notwithstanding, it has long been a fundamental principle of our federal system that a court has no power to entertain a case where subject matter jurisdiction is lacking. *See e.g., Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868); *Sheldon v. Sill,* 49 U.S. (8 How.) 441, 448, 450, 12 L.Ed. 1147 (1850); *Turner v. President, Directors and Co. of the Bank of North America,* 4 Dallas 8, 11 (1799). The willingness of the Court of Appeals to violate this principle in *Scott Paper* not only lends credence to my conclusion that appellate courts *should* dispose of petitions challenging the Adminstrator's vetoes, but it also demonstrates that the record before them is sufficiently developed that they *can* do so.

Finally, I note that *Shell Oil Co. v. Train,* 585 F.2d 408 (9th Cir. 1978), cited by Judge Duniway with a *"But see"* signal, is in part contrary to the result reached by my colleagues. It therefore

furnishes another ground for *en banc* review. The issue in *Shell Oil* was whether the Court of Appeals had jurisdiction under subsection (F) to review the state regional board's denial of an NPDES permit. Shell had alleged that even though the denial was by a state agency, that agency had been "caused" to deny the permit by the EPA. However, the Court of Appeals held that *Scott Paper* was not controlling because "Shell [had] not alleged an actual veto by the EPA of the regional board's decision." 585 F.2d at 413.

In the part of the opinion that supports the position I take here, however, the Court focused on a second action brought by Shell to challenge the regional board's denial of its requested permit. In addition to the federal suit then before the Court, Shell had sought review of the regional board's action by petitioning the California State Water Resources Control Board. While the federal action was pending in district court, the state board reversed the regional board and granted Shell a variance on its Class E permit. The proposed variance was then transmitted to the EPA Administrator pursuant to 33 U.S.C. § 1342(d), and he vetoed it by filing a written objection. "That decision," wrote the majority of the panel, "is reviewable in this court under 33 U.S.C. § 1369(b)(1)." 585 F.2d at 412. The only subsection of § 1369(b)(1) the Court could have been referring to was subsection (F). Thus, the *dicta* in *Shell Oil* directly contradicts *Scott Paper* and supports the position I have taken.

In conclusion, I urge the Court to reconsider *Scott Paper* by taking the present case *en banc*. Because of the congressional desire for speedy resolution of disputes under the Act, the need for a consistent system of judicial review, the functional effect of the Administrator's written objections, and the sufficiency of the administrative record, I would find that the courts of appeals, rather than the district courts, have initial jurisdiction to review the Administrator's vetoes of state-issued NPDES permits.

Appendix B

FILED
OCT 15 1979
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

United States Court of Appeals

for the Ninth Circuit

CROWN SIMPSON PULP COMPANY; LOUISIANA-PACIFIC CORPORATION, *Petitioners,* vs. DOUGLAS M. COSTLE, as Administrator, Environmental Protection Agency, *Respondent.*	Nos. 77-3322 76-3161 76-3287 ORDER

Before: DUNIWAY and CHOY, Circuit Judges,
and RENFREW, District Judge

Judges Duniway and Choy vote to deny the petition for a rehearing in these cases. Judge Renfrew votes to grant the petition for a rehearing. The petition for a rehearing is denied.

The suggestion that a rehearing in banc be granted has been submitted to all active members of the court and no judge has asked that a vote be taken on the suggestion. The suggestion of a rehearing in banc is rejected.

Appendix C

FILED
OCT 24 1979
RICHARD H. DEANE
Clerk, U.S. Court of Appeals

United States Court of Appeals

for the Ninth Circuit

CROWN SIMPSON PULP COMPANY, LOUISIANA-PACIFIC CORPORATION, CROWN SIMPSON PULP COMPANY and LOUISIANA-PACIFIC CORPORATION, *Petitioners,* vs. DOUGLAS M. COSTLE (formerly Russell E. Train) As Administrator, Environmental Protection Agency, *Respondent.*	Nos. 76-3161 76-3287 77-3322 EPA REGION #9

ORDER STAYING ISSUANCE OF MANDATE

Upon application of W. Reece Bader, Esq., counsel for the petitioners, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the petitioners herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before November 21, 1979.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

BEN. C. DUNIWAY
United States Circuit Judge.
Judge Duniway

DATED: SAN FRANCISCO, CALIF.
October 24, 1979

Appendix D

IN RE LOUISIANA-PACIFIC CORPORATION

Environmental Protection Agency

IN THE MATTERS OF LOUISIANA-PACIFIC CORPORATION, NPDES NO. CA0005894 and CROWN SIMPSON PULP COMPANY, NPDES NO. CA0005882, September 15, 1977

Two companies request variances from best practicable technology effluent limitations.

Requests denied.

Full Text of Opinion

Decision of the Administrator

I have been asked to consider the granting of variances from effluent limitations guidelines for two pulp, paper, and paperboard mills located on the Pacific Coast of California. The requests for variances are denied.

I. *Procedural Background*

On March 29, 1977, Mr. Bill B. Dendy, Executive Officer of the State Water Resources Control Board for the State of California, submitted extensive materials concerning the actions taken before the California Regional Water Quality Control Board, North Coast Region, and before the State Board itself, with respect to these two mills. A list of the enclosures to that March

29 letter appears in the margin.[1] Mr. Dendy noted in his March 29 letter that the "state board finds that a variance is warranted for the two dischargers . . . on the grounds that the environmental benefits (if any) to be derived from the application of the treatment required to meet the guideline limitations for BOD and pH would be far outweighed by the non-water quality environmental costs including use of energy." Mr. Dendy went on to say that he believes "that variance based on these grounds is in accordance with the precedents established in the decisions of several U.S. Court of Appeals, particularly the Fourth Circuit's decision of the case of *Appalachian Power v. Train* [545 F.2d 1351 [9 ERC 1033] (1973)]."

On May 26, 1977 Mr. G. William Frick, EPA General Counsel, issued a Recommended Decision of the Administrator which recommended denial of the variance requests of the two com-

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1. A. State Board Order No. WQ 77-6 (with exhibits thereto).
B. Transcript of hearing before the State Board, December 22, 1976.
C. Transcript of hearing before the Regional Board, July 29, 1976.
D. Transcript of hearing before the Regional Board, August 26, 1976.
E. "Written Comments on Tentative Orders" presented to the Regional Board July 21, 1976.
F. "Request for Variance in EPA Limitations on the Basis of Fundamentally Different Factors" dated June 21, 1976.
G. Written Statement of Dr. Herman R. Amberg before the California Regional Water Quality Control Board, North Coast Region, July 19, 1976.
H. "Written Comments on Tentative Wastes Discharge Orders" dated December 1976.
I. Interoffice Memorandum from John R. Hannum to D.C. Joseph and Gary Grimm dated December 13, 1976.
J. "Non-water Quality Environmental Impacts" calculation by Dr. Amberg; presented at State Board Hearing, December 22, 1976.
K Letter from Dr. C. Edward Taylor to Mr. W. Don Maughan dated January 13, 1977.
The two companies have commented that this list does not include certain documents which were before the State during its proceedings. However, they do not argue that the documents are vital to this decision nor have they taken the opportunity afforded by the notice and comment procedure to make any such materials available to me. Under the circumstances, and given the purely legal nature of my decision, I see no need to amplify the record.

panies. 42 *Fed. Reg.* 28167-72 (June 2, 1977). The preamble to the recommended decision advised that written comments on the decision could be submitted and that all such comments received by July 5, 1977 would be considered prior to issuance of a final decision of the Administrator. Comments were timely filed by Crown Simpson Pulp Company and Louisiana-Pacific Corporation (joint submission), the law firm of Hunton & Williams (on behalf of the Utilities Water Act Group and other petitioners in *Appalachian Power Co. v. Train*), Southern California Edison Company, East Bay Municipal Utility District and the National Wildlife Federation.

In reviewing the submissions by the State of California and the extensive materials, including legal briefs, submitted by the Louisiana-Pacific Corporation and the Crown Simpson Pulp Company to the State as well as the comments on the recommended decision, I have assumed for the purpose of the opinion as factually accurate the statements by the State and the industry as to the essential nature of operations at these facilities, the water quality effects of the discharges, the energy impact, the cost of application of the technology which would be required to meet EPA's national limitations, and other major relevant facts. The Environmental Protection Agency has conducted no independent review of the facts following the submission of the requests for variances. In other words, the record of the State Board hearing as submitted by Mr. Dendy with the addition of the Development Document for the effluent limitations guidelines applicable to these mills, constitutes the record which I have reviewed. While the Development Document was not formally forwarded to me as part of the record, I note that it is referred to repeatedly in the various materials which are part of the record, including the opinion and order of the State Board, and it is therefore properly before me.

As I discuss in more detail below, the issues which are to be resolved in these variance requests are solely legal, and do not

require an independent analysis or weighing of facts. This is not to say, however, that in other variance requests it would not be appropriate to conduct factual reviews.[2]

The Crown Simpson Pulp Company and the Louisiana-Pacific Corporation each operate bleached kraft pulp mills on the Samoa Penninsula, on the west side of Humboldt Bay, near Eureka, California. Louisiana-Pacific also operates a plywood mill at this location. Each mill produces about 600 air dry tons per day of bleached kraft pulp; the Louisiana-Pacific saw mill also produces about 500,000 board feet per day of lumber. Each mill principally discharges through separate ocean outfalls about 2500 feet from shore and at a depth of approximately 30 to 40 feet. The outfalls are about one mile apart, and each has a diffuser at the end.

On December 4, 1974 the Regional Board of the California Water Resources Control Board adopted waste discharge requirements for these dischargers; at that time national effluent limitations guidelines for these sources were not available. EPA Region IX objected to the Regional Board orders on the grounds that the Regional Board failed to implement the provisions of Sections 301 and 304 of the Federal Water Pollution Control Act by not imposing effluent limitations in those orders which would require achievement of best practicable control technology currently available by July 1, 1977. The State Board reviewed

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2. Crown Simpson and Louisiana-Pacific complain of the lack of an opportunity for a hearing before me, arguing that such a hearing is required by law. But the companies were given extensive opportunity for hearings by the State and an opportunity to comment upon the General Counsel's recommended decision. I have not augmented the record compiled by the State nor have I independently evaluated the factual conclusions reached below. A hearing, particularly of the nature apparently envisioned by the two companies in which they would "respond to [my] questions concerning the voluminous record in the . . . proceedings before the State . . ." would be a useless exercise. I have carefully considered the arguments made by the companies concerning the legal issues involved in this proceeding. I am convinced that the procedures I have used have been fair and entirely adequate and that all process "due" has been provided.

the regional orders and, after a hearing on March 7, 1975, remanded the orders to the Regional Board with directions that effluent limitations based on best practicable control technology, or "BPT", be included. These BPT limitations were to be based on promulgated national regulations if available, otherwise the Regional Board was directed to establish the numbers based on its best judgment as to what constituted BPT.

On February 19, 1976, EPA promulgated interim final effluent limitations guidelines for the bleached kraft sector of the pulp, paper and paperboard point source category. 40 CFR Part 430 Subparts F-I. EPA issued final amendments to these regulations on January 6, 1977. The validity of the national regulations is not at issue in this variance proceeding.[3] Each national limitation contains a variance clause[4] which in essence provides that a discharger may submit evidence that factors such as the age or size of plants, raw materials, manufacturing processes, treatment technology available, energy requirements or other such factors, are

3. The regulations are being challenged in *Weyerhaeuser Company, et al. v. Train,* No. 76-1674, et al. before the United States Court of Appeals for the District of Columbia Circuit. See footnote 5, *infra.*

4. For example, Section 430.72 reads in part as follows:
In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry sub-categorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations or initiate proceedings to revise these regulations.

fundamentally different from the factors considered during the establishment of the national effluent limitations guidelines.[5]

In accordance with the instructions from the State Board, the Regional Board conducted hearings with respect to these two mills, on June 24, July 29, and August 26, 1976. The discharge restrictions for Crown Simpson and Louisiana-Pacific established by the Regional Board did not follow the EPA national effluent limitations guidelines. On September 3, 1976, EPA Region IX issued a letter of objection to the Regional Board orders, noting that the Regional Board had in effect granted variances from the national limitations without submitting the matter to the Administrator of EPA for approval. This action by EPA prompted the two mills to seek review in the United States Court of Appeals for the Ninth Circuit (Nos. 76-3161 and 76-3287). Those actions have been stayed pending decision on this matter.

On October 21, 1976 the State Water Resources Control Board adopted resolution 76-108 to review the action of the Regional Board with respect to these two mills. On December 22, 1976, the State Board held a hearing, and on March 17, 1977, the Board issued its opinion.

The Board ordered that the Regional Board Orders No. 76-133 and 76-134 be set aside and replaced by the permits established by the State Board. It granted the requested variances from the effluent limitations guidelines for BOD and pH, subject to ap-

5. Crown Simpson and Louisiana-Pacific note in their comments that should I deny their variance request they may seek judicial review of my decision and raise the question of whether the variance provision is valid.

proval by the EPA Administrator, and ordered the Executive Officer of the State Board to forward to EPA all necessary information, data and documents for a prompt decision on this matter. Alternative effluent limitations for BOD and pH, to apply in the event the variances were approved or denied by the Administrator, were established in the permits. The dischargers also were granted an extension of time until July 1, 1983, to meet the effluent quality requirements for chromium contained in the California Ocean Plan.[6]

The differences between the permit conditions based on the national effluent limitations guidelines, on the one hand, and those which will result from the granting of the variances from those guidelines, on the other hand, are substantial. In NPDES Permit No. CA0005882 the limitation on BOD5 (daily maximum) is 18,450 pounds, and the limit on total solids is 36,480 pounds. The pH must be maintained within the range of 5.0 - 9.0. According to the terms of the permit, "Upon approval by the Administrator of EPA of the finding of 'fundamental difference' . . . the following limitations shall apply in lieu of the limitations [set forth above]". These are 96,000 pounds per day of BOD5 (daily maximum) and pH within the range of 3.0 to 10.0.

For the Louisiana-Pacific Mill (NPDES permit No. CA0005894) the differences are similar. In all cases the BOD figures cited pertain to the pulp operations, which are by far the major sources of BOD at these facilities.

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6. The National Wildlife Federation filed comments which fully support my denial of the BPT variances but which urge that I also disapprove the extension of time given the two companies by the State for meeting chromium effluent quality requirements derived from the California Ocean Plan. This proceeding, however, is not a general review of the State-issued permits. It concerns only the appropriateness of granting variances from EPA Effluent limitations guidelines, and my decision is limited to this question. I express no opinion whatever on any other aspect of the State proceedings.

II. *The Legal Issue*

The California State Water Resources Control Board found that because there would be "no expected or predictable water quality improvement as the result of imposition of the EPA guidelines [and i]n light of . . . the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal . . . the evidence justifies the variance requested." (Board Opinion p. 17). It is clear that the Board did not find a "fundamental difference" in terms of non-water quality impact itself but instead found non-water quality impact to be significant *because of lack of improvement of local receiving water quality.* In effect, the State granted an exemption from minimum national technology-based standards because of local water quality considerations. This was contrary to the letter and intent of the FWPCA and I have no choice but to disapprove the state action.

The heart of the Louisiana-Pacific and Crown Simpson presentations to the State Boards was the absence of a need to control BOD and pH. In essence, what the companies argue is that because they are located on the Pacific Ocean, with its vast dilution and regenerative powers, one need not be concerned with pollution requirements which assertedly are designed solely to protect the oxygen levels or pH of receiving streams. They argue that the oxygen level even in the immediate area of their discharge pipes is not a matter of concern.

BOD is not a metal or a chemical compound or a specific substance that pollutes the environment. It is a measure of the quantity of oxygen required for the biological and chemical oxidation of water-borne substances under ambient or test conditions. The BOD5 test is a procedure which provides an estimate of the oxygen consumed by micro-organisms utilizing the degradable matter present in a waste under conditions that are representative of those that are likely to occur in nature. Standard conditions of

time (5 days), temperature, suggested microbial seed, and dilution water for the wastes have been defined and are incorporated in standard analytical procedures. As noted in the Development Document for the Effluent Limitation Guidelines (BPT) for the Bleached Kraft, Groundwood, Sulfite, Soda Deink, and Non-integrated Paper Mills Segment of the Pulp, and Paperboard Point Source Category, at pages 267 and 268:

> The BOD of a waste exerts an adverse effect upon the dissolved oxygen resources of a body of water by reducing the oxygen available to fish, plant life, and other aquatic species. Conditions can be reached where all of the dissolved oxygen in the water is used resulting in anaerobic conditions and the production of undesirable gases such as hydrogen sulfide and methane. The reduction of dissolved oxygen can be detrimental to fish populations, fish growth rate, and organisms used as fish food. A total lack of oxygen due to the exertion of an excessive BOD can result in the death of all aerobic aquatic inhabitants in the affected area.
>
> * * *
>
> The BOD5 test is also an indicator of the total organic load that is being discharged to a receiving stream. Compounds contributing to this total organic waste load found in pulp and paper mill wastes include terpenes, resin acids, fatty acids, phenols, formic acid, saccharinic acids and other small organic acids. These compounds also contribute to the toxicity of a pulp and paper mill waste.

There are substantial testimony and a number of documentary materials referred to in the record indicating that the waste materials discharged by Crown Simpson and Louisiana-Pacific through their ocean outfalls are not causing a significant environmental problem with respect to oxygen reduction or pH levels in the receiving waters. I do not believe that it is necessary to consider the extent of that problem or debate such issues as the limits

of the mixing zone for the dischargers.[7] For the purposes of reviewing these applications for variances, I will assume that the arguments of Crown Simpson and Louisiana-Pacific are correct in that there is not a need, based purely on water quality considerations, to control the BOD emanating from these mills beyond those levels contained in the variance-based permits. While the facts and arguments are less clear with respect to the pH requirements contained in the national effluent limitations guidelines, I will also assume for the purposes of this proceeding that there is no water quality need to limit the pH discharge other than as contained in the California permits based on the variances.[8]

In its March 17, 1977, opinion the State Board noted that the dischargers had submitted evidence regarding the chemicals required should they be forced to treat their wastes to meet EPA national guidelines, the direct and indirect power requirements associated with such treatment and the potential biological sludge disposal problems which would result from the use of EPA recommended technology (Opinion pages 15-18). Again, for the

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7. I note that the State Board observed that "some of the organic compounds which contribute to the BOD may cause problems in the receiving water . . . ." Opinion p. 7. Crown Simpson and Louisiana-Pacific argue in their comments that it is improper to state that there is any relationship between effluent toxicity and BOD and pH. The quotation, however, accurately reflects the finding of the State Board and I see nothing improper in its inclusion in this opinion.

8. Crown Simpson and Louisiana-Pacific criticize the recommended decision for being too equivocal on the question of the water quality impact of their discharges. However, as noted previously, no independent review of the evidence has been undertaken, and it would therefore not be appropriate for me to endorse or concur in any conclusions reached on this subject by the State. Instead, it is accurate to say only that for the limited purpose of deciding the legal issue presented in this proceeding I assume that limitations on BOD and pH more stringent than those imposed in the variance-based permits would not improve receiving water quality. I find the attack upon the propriety of this procedure curious, since assumption of the existence of facts for limited legal purposes is a judicial technique of long standing.

purposes of this variance proceeding I consider as true the Board findings in these respects.[9]

The issue to be resolved is straightforward: does the Federal Water Pollution Control Act, as amended ("FWPCA") allow EPA to vary technology-based water pollution regulations simply because the receiving water quality at particular sites will not be measurably improved by compliance with those regulations? Counsel for the companies stated the matter this way in a brief before the State Board:

> "[Crown Simpson] and [Louisiana-Pacific] are not asking this Board to countenance a wholesale return to an ineffectual water quality approach. Rather, they submit that they have affirmatively demonstrated that there is a *fundamental* difference between the marine environment into which they discharge and *all other* receiving waters. None of the dilatory or obscurantic tactics sometimes encountered under the old system are possible when the applicant bears the burden of proving its entitlement to a variance. And while most differences in receiving waters are ones of degree, which may be burdensome administratively to distinguish, the difference between the ocean and inland waters is categorical, so that the differentness of the ocean need only be decided once." (p. 24)

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9. The Board did not make independent findings of fact with respect to several of these factors; it merely stated, "the dischargers submitted evidence regarding [these factors.]" In effect, I am accepting as true the assertions of the companies before the State Boards, for the purposes of this proceeding. There was also testimony to the effect that redwood pulp produces more BOD than any other wood species, and that these two mills may be the only mills using that wood (Tr. 47), but there is no explanation in the record as to the contribution this factor would have to the much higher BOD allowed under the variance-based permits. Moreover, I note that this issue was not pressed as an important fact by the companies or relied upon by the State Board, and no mention of this factor was made in comments submitted by the companies on the recommended decision.

Counsel for Crown Simpson reiterated this point during the December hearing (Tr. 101):

> What the companies are saying is that essentially all of the requirements can be met with the exception, perhaps, of the chromium heavy metal requirement through the use of internal procedures. It can be met at a certain cost. To impose the BOD limitation is to impose on them an enormous additional cost with no environmental benefit.

When Congress enacted the Federal Water Pollution Control Act Amendments of 1972, it brought about a major change in the approach to water pollution control. Congress declared in unmistakable statutory language that certain key regulations were to be based on pollution control technology, not water quality. Localized improvement in water quality as the result of compliance with technology-based regulations was desired, but the existence of the nexus was not to be dispositive as to the application of those regulations. The Senate Committee on Public Works explained the reasons for the change in approach:

> The water quality standards program is limited in its success. After five years, many States do not have approved standards. Officials are still working to establish relationships between pollutants and water uses. Time schedules for abatement are slipping away because of failure to enforce, lack of effluent controls, and disputes over Federal-State standards.
>
> The Committee adopted this substantial change because of the great difficulty associated with establishing reliable and enforceable precise effluent limitations on the basis of given stream quality. Water quality standards, in addition to their deficiencies in relying on the assimilative capacity of receiving waters, often cannot be translated into effluent limitations—defendable in court tests, because of the imprecision of models for water quality and the effects of effluents in most waters.
>
> Under this Act the basis of pollution prevention and elimination will be the application of effluent limitations.

Water quality will be a measure of program effectiveness and performance, not a means of elimination and enforcement.

The Committee recommends the change to effluent limitations as the best available mechanism to control water pollution. With effluent limits, the Administrator can require the best control technology; he need not search for a precise link between pollution and water quality.[11]

S. Rept. No. 92-414, 92nd Cong. 1st Sess. at 8 (1971), Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong. 1st Sess. (1973) (2 vols.) (hereafter cited as Leg. Hist.) at 1426.

Both the Act and its legislative history clearly indicate that Section 301(b)(1)(A) effluent limitations are not to be based on the nature, quality or location of receiving waters. This is demonstrated by Section 301(b) itself. Section 301(b)(1) provides that point sources other than publicly owned treatment works must meet, "(A) not later than July 1, 1977 effluent limitations . . . which shall require the application of the best practicable control technology currently available . . . and . . . (C) . . . any *more stringent* limitation, including those necessary to meet water quality standards . . . ." (emphasis added). The basic structure of the Act is therefore clear. Technology-based limitation imposed pursuant to Section 301(b)(1)(A) are independent of local water quality considerations, but where local water quality-based requirements are *more stringent* than 301(b)(1)(A) requirements they may be imposed pursuant to Section 301(b)(1)(C). This statutory structure would be rendered meaningless if 301(b)(1)(A) limitations can be downgraded due to water quality considerations. Section 304(b) of the Act, which lists the factors which must be taken into account in developing Section 301(b)(1)(A) indus-

11. From 1965 until the enactment of the FWPCA, the quality of interstate waters had been regulated primarily by State water quality standards, which States were required to promulgate and have approved by the Federal Government under the Water Quality Act of 1965.

trial effluent limitations—from which Crown Simpson and Louisiana-Pacific seek relief—conspicuously omits any reference to water quality.[12] Similarly, Section 304(d)(1), which requires the Administrator to publish information on "the degree of effluent reduction attainable through the application of secondary treatment" for the purpose of developing Section 301(b) effluent limitations for municipal treatment works, contains no reference to the nature or quality of the receiving waters. Clearly, Section 301(b)(1)(A) effluent limitations are not to be based on ambient water quality considerations. The Committee hearings and Congressional debates show that there was no misunderstanding of this vital point by the Congressmen voting for this major bill.[13]

12. Crown Simpson and Louisana-Pacific argue that the statutory phrase "effluent reduction benefits" means water quality impact. As will be shown below, this argument is entirely unfounded. See *infra* at pp. 31-32.

13. *See e.g.:*

From the Senate Report:

The application of Phrase I technology to industrial point sources is based upon the control technologies for those sources and to publicly owned sewage treatment works is based on secondary treatment. It is not based on ambient water quality considerations. [Leg. Hist. at 1461 (emphasis added.)] The use of any river, lake, stream *or ocean* as a waste treatment system is unacceptable. [Leg. Hist. at 1425 (emphasis added).]

From the House Report:

The determination of the best practicable control technology currently available under Section 301(b)(1) is not to be governed by the existing quality of the receiving waters. [Leg. Hist. at 788.]

From the Conference Report:

. . . [T]he intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under [Section 304(b)], so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations. [Leg. Hist. at 309.]

From Congressional Debates:

Remarks of Senator Muskie, Chairman, Senate Subcommittee on Air and Water Pollution, Leg. Hist. at 170.

Remarks of Representative Jones (Alabama), House Conferee, Leg. Hist. at 231.

Remarks of Senator Tunney, Leg. Hist. at 209.

It perhaps is best summed up in the remarks of Representative Clausen, a House conferee:

> Now, and I emphasize this, such "best practicable control technology" will be required even if the quality of the receiving waters do [sic] not require the imposition of effluent limitations consistent with best practicable control technology. This is a technological standard [Leg. Hist. at 378].

Water quality standards remain a vital part of the amended law, but they are not to be used as a means to avoid compliance with effluent limitations guidelines and new source standards; the discharger must comply with all applicable regulations. The following appears in the Senate Public Works Committee Report:

> Section 301(b)(1)(C) provides adequate authority to apply new information to existing water quality requirements and *upgrade* effluent limits accordingly.
>
> In other words, wherever the Administrator determines that application of the best practicable treatment requirements of Phase I will not provide for implementation of existing water quality standards for interstate or intrastate streams, *he must tighten the requirements* against a source of discharge or group of sources. Leg. Hist. at 1462.

The same is true of water quality related effluent limitations under Section 302:

> Where application of the best available control technology . . . will not attain . . . [the prescribed] standard of water quality, *more stringent effluent limitations* or alternative control strategies can be imposed [under Section 302].
>
> * * *
>
> *Section 302 is intended to furnish a supplemental basis for improving water quality, and not be a cause for delay* in executing the requirements of Section 301, or for requiring any less stringent effluent limitations. [Leg. Hist. at 1464, 1466 (emphasis added)].[14]

Congressman Wright, a House conferee, expressed his belief that EPA and the States would approach their regulatory duties as the Senate had outlined. He stated that the combination of technology-based and water-quality based restrictions on discharges was "a new system of cleaning up streams by a limitation upon point discharges, a dual approach [which] provides that whichever is the stronger shall apply." Leg. Hist. at 488.

The Supreme Court recently acknowledged the roles water quality and technology feasibility play under the FWPCA.

> The reasons for the statutory scheme have been described as follows: "Such direct restrictions on discharges facilitate enforcement by makinug it unnecessary to work backward from an overpolluted body of water to determine which point sources are responsible and which must be abated. In addition, a discharger's performance is now measured against

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14. See also Leg. Hist. at 791 (House Report characterizes Section 302 as providing authority to "supplement any effluent limitations set pursuant to [Section 301(b)(2)]" and notes that proposed effluent limitations under Section 302 "shall in no case operate to delay the application of any effluent limitation established under Section 301"); 209 (Senator Tunney observes that effluent limitations are only "a minimum measure of compliance"); 246 (Representative Harsha, a House conferee, notes that "The water quality requirements are not intended to be in lieu of the technological requirements for 1977 but are required to be the basis for water quality control if they are more stringent than the effluent limitations determined by 'best practicable control technology currently available' ", and that "section 303 . . . is intended to be a supplement to the 1977 and 1983 requirements."), 1281, 1283, 1285 (Senator Bentsen, a Senate Committee member, notes that "[w]here a State or the Administrator finds [Section 301(b)(2) limitations] are insufficient under the criteria of section 302, tougher effluent limitations and alternative control strategies must be established.").

strict technology-based effluent limitations—specified levels of treatment—to which it must conform, rather than against limitations derived from water quality standards to which it and other polluters must collectively conform." *EPA v. State Water Resources Control Board,* 426 U.S. 200, 204-205, 96 S. Ct. 202, 204, 48 L. Ed.2d 578 (footnotes omitted).

E. I. duPont de Nemours and Co. v. Train, 430 U.S. 112, 97 S. Ct. 965, 972, n. 3 [9 ERC 1753] (1977).[15]

When Congress intended there to be deviation from technology standards due to water quality considerations, it provided definite indication of that intent. Thus, Section 316(a) provides for relaxation of technology-based limitations for thermal discharges, when the discharger can demonstrate that the environment will be protected adequately.[16]

It is in light of this strong Congressional sentiment against water-quality based exceptions from national technology standards that the Crown Simpson and Louisiana-Pacific appeals must be considered, and against which the decisions of the California

15. Similarly, the U.S. District Court for the Central District of California recently observed that "Section 301 deals with the technological control of pollutants at their source, *without regard to their effect on the immediate environment . . . .*" *Pacific Legal Foundation v. Quarles,* Civil No. 77-521-HP [10 ERC 1369] (July 20, 1977), slip op. at 8 (emphasis added).

16. That section states:

With respect to any point source otherwise subject to the provisions of section 301 or section 306 of this Act, whenever the owner or operator of any such source, after opportunity for public hearing, can demonstrate to the satisfaction of the Administrator (or, if appropriate, the State) that any effluent limitation proposed for the control of the thermal component of any discharge from such source will require effluent limitations more stringent than necessary to assure the projection [sic] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made, the Administrator (or, if appropriate, the State) may impose an effluent limitation under such sections for such plant, with respect to the thermal component of such discharge (taking into account the interaction of such thermal component of such discharge with other pollutants) that will assure the protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife in and on that body of water.

Water Resources Control Board must be viewed. To the extent that the Board Opinion assumes regulatory authority to relax implementation of technology-based standards for reasons related to water quality, that Opinion is wrong. Efforts by commenters (particularly Hunton & Williams) to argue otherwise are unpersuasive. There is nothing inconsistent between the ultimate congressional goal of cleaner water and the technology-based approach required by Section 301(b)(1)(A) of the Act. As explained by Senator Cooper, a Senate Conferee,

> This is a very direct approach. It is a pragmatic approach. I think we all acknowledge that, in the short run, it may often require larger expenditures then permitting discharges to the point where the water can be shown to be degraded for some use. But I think it is fair to say that after the most thorough examination, the committee concluded that the approach adopted in the bill promised to be a far more effective means of attacking the problems of water pollution control than the 1965 act. Leg. Hist. at 1304. While Hunton & Williams quote Representative Jones' statement that Congress did not wish "to credit one environmental account and debit another" so as to "negate the overall benefit of the achievement of higher water quality", Leg. Hist. at 232, they ignore the same congressman's statement that "With the exception of modifications of section 301 requirements for the discharges of heat which may be made pursuant to section 316(a), the determination of the *'best practicable control technology currently available' is not to be based upon the existing quality of the receiving waters.*" Leg. Hist. at 231. (emphasis added). Congress consciously adopted the Section 301 approach of uniform minimum levels of controls based on technological achievability rather than receiving water quality as its chosen means to attain the

goals set out in Section 101 of the Act.[17] I have no authority to defy that statutory mandate.[19]

Crown Simpson and Louisiana-Pacific argue that this proceeding presents a situation in which the practical problems normally associated with a water quality related approach to pollution control do not apply, and that therefore an exception to the technology-based approach of Section 301(b)(1)(A) is warranted. They contend that Congress adopted the technology-based approach largely out of concern with the difficulty of calculating and defending water-quality based requirements, but that this concern does not apply here because the burden of proof in a

17. Moreover, I think that it should be remembered that the *first* enumerated goal set out in Section 101(a) is "that the discharge of pollutants into navigable waters be eliminated by 1985." As thoughtfully explained by Senator Buckley this goal indicates a congressional belief that ultimately *no level* of discharge of pollutants should be tolerable.

> Of course, the bill itself has abandoned the attempt, as an ultimate goal, of drawing a causal connection between the discharge of pollutants and the degradation of our streams. In effect, we are saying we know so little about the ultimate consequences of injecting new matter into water that it involves a presumption of pollution, and the way to insure ourselves against pollution is through the control and ultimate elimination of pollutants.
> Leg. Hist. 1332.

19. [sic] Hunton & Williams also argue that my decision in *In Re Public Service Company of New Hampshire* [10 ERC 1257] (No. 76-7, June 17, 1977) ("Seabrook") is inconsistent with the legal analysis in this decision. In *Seabrook* at page 13 I found that Section 316(b), which concerns cooling water intake structures, does not require use of technology whose cost is wholly disproportionate to the environmental benefit to be gained. I see no inconsistency. Sections 301(b)(1)(A) and 316(b) are quite different. Section 316(b) is explicitly site-specific while Section 301(b)(1)(A), as discussed above, concerns uniform national standards. Moreover, Section 316(b) concerns the environmental impact of entrapment and entrainment while Section 301(b)(1)(A) concerns reduction in the amount of pollutants discharged by industrial point sources. In establishing effluent limitations guidelines for the paper industry the Agency considered cost in relation to effluent reduction benefits. But the fact that this analysis did not involve consideration of local receiving water quality is inconsistent with neither my decision in *Seabrook* or the language and history of Section 301(b)(1)(A).

variance proceeding is on the discharger rather than EPA and because the discharger must show a "fundamental" difference in water quality impact. Similarly, the fact that this is a variance proceeding is said to mean that the congressional desire for uniformity of requirements will not be compromised and that the administrative burden upon EPA will not be exessive.

I do not share the companies' confidence that merely by casting matters in the form of a variance that all problems associated with a water-quality based approach evaporate. At best, problems of correlating effluent discharge levels to water quality and of maintaining a measure of national uniformity may be reduced. But these problems will certainly remain severe. More important, regardless of whether or not a water-quality based variance would be meritorious, it would not be consistent with the statute. Congress was well aware of the possibility of such a variance and adopted just such a provision for thermal discharges in Section 316(a). The limitation of Section 316(a) to heat was, in effect, a deliberate rejection by Congress of the kind of scheme proposed by the two companies here.[20]

The question presented is one of fundamental importance under the Act. Congress deliberately chose a technology-based approach and fully appreciated the fact that under certain circumstances it would result in treatment beyond that needed to attain or maintain water quality. To retreat from this basic congressional scheme in this proceeding would, despite Crown Simpson's and Louisiana-Pacific's bland assurances to the contrary, set a precedent which would threaten the integrity of the Act.[21]

20. Congress is now considering amendments to the Act which would provide relief to publicly owned treatment works discharging to marine waters. *See* H.R. 3199, S. 1952. These amendments would not apply to industrial dischargers.

21. While the companies assured the State that their arguments applied only to marine discharges, *see supra* at p. 14, the fact is that their arguments logically apply to discharges into any body of water with high dispersion characteristics, and therefore these arguments represent an assault upon one of the basic elements of the 1972 amendments.

The March 17, 1977, Order and Opinion of the California Water Resources Control Board does not directly dispute the interpretation of the FWPCA which I have presented. Instead, the Board appears to rely heavily on recent judicial discussion of EPA's variance clause to support its approval of variances for Crown Simpson and Louisiana-Pacific. However, I cannot agree with the Board's determination. One reason is that I do not believe the cases support the legal position adopted by the Board. Second, I believe the Board's action in effect is the granting of water quality-based variances, which is prohibited.

Essential to a careful review of the Board's determination are the following findings by the Board:

1. "There do not appear to be any environmental benefits which will be derived by requiring these discharges to meet either the [California State] Ocean Plan or Guideline limitations for BOD or pH." (Board Opinion p. 9)

2. "In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines. In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with sludge disposal) we can only conclude the evidence justifies the variance requested." (Board Opinion pp. 16-17).

The variances were granted not because the non-water quality environmental impacts of BPT were of themselves fundamentally different from the impacts considered in the development of the

effluent limitations guidelines, but instead because this factor *in relation to* the absence of water quality problems was deemed to be fundamentally different. I cannot find any statement by the State Board that the non-water quality environmental impacts (i.e. sludge, energy etc.) of BPT for the two mills are fundamentally different in and of themselves.[22]

The only aspect of the Crown Simpson and Louisiana-Pacific situation which was found different from most other mills is, in effect, that they discharge directly into the ocean. The companies candidly admitted that this is the "fundamental" difference in the State proceedings.[23]

The issue resolves into asking whether water quality considerations are valid grounds for variances from effluent limitations based upon best practicable technology. The answer to this, as the California Board itself stated, is that it is not a valid basis:

> The argument advanced by the dischargers (variance based on type of the receiving water) is, in our opinion, the essence of what Congress intended to avoid with the Federal Water Pollution Control Act Amendments of 1972. The legislative history of the Amendments reflects a conclusion that regulation of pollution based on a plant by plant basis was unwork-

22. The problems associated with sludge disposal on the Samoa peninsula was mentioned by the Board as if this were possibly a fundamentally different factor. But the record is ambiguous on the point. The companies did not rely on this difference in their requests for variances to the State. And the State never explicitly found sludge disposal problems at the two mills to be fundamentally different from those problems considered by EPA in developing the regulations.

23. See *supra* at p. 14. Witnesses for the companies, and counsel in their behalf, have stated that these mills were never considered by EPA in drafting national regulations. The State Board opinion also states this (p. 5). According to a key to the identification of plants used in the preparation of the Development Document, which key has been made available to all who have requested access—including Crown Simpson and Louisiana-Pacific, both mills were evaluated by EPA. For example, on page 186 of the Development Document, plant 185 (Crown Simpson) and plant 186 (Louisiana-Pacific) are listed. Data for production, flow, BOD5, and TSS for the Crown Simpson mill were used in calculating national limitations. There were insufficient data for Louisiana-Pacific's mill to be used this way.

> able from a practical regulatory standpoint. Congress based the Amendments on predefined minimum levels of treatment technology which were to be applied regardless of the type of receiving water. (Opinion, p. 6).

My authority to provide for variances from BPT flows from, and is inherent in, my authority to promulgate effluent limitations guidelines under Sections 301(b)(1)(A) and 304(b)(1).[24] Thus, in considering variances from effiuent limitations I am as constrained by the language and legislative history of the Act with regard to this issue as I am in promulgating the national limitations. Variances can only be based on fundamental differences in factors which are appropriate to technology-based regulations and limitations derived through the variance process must still meet the congressional difinition of best practicable control technology currently available.

I therefore reject as unsound the argument by Crown Simpson and Louisiana-Pacific that because variances from BPT are not explicitly mentioned in the Act or its legislative history that I may completely ignore the statute and the intentions of its drafters in administering the variance provision. But in so doing I do not agree that I have rendered the variance provision meaningless. I find only that the variance provision cannot be used to do what Congress clearly forbade. This does not mean that where a fundamental difference can be shown with respect to a factor other than water quality that a variance may not be appropriate.[25]

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24. For this reason it is entirely appropriate that variances from BPT be subject to my approval.

25. The two companies charge that by rejecting their requests I have established that "it is never appropriate to grant a variance from the requirement of installing a secondary treatment facility." If a fundamental difference can be shown in a factor (other than water quality) and a degree of treatment less than "secondary" would be appropriate under the Act, then such a reduced requirement may be established. But whatever requirement is established for a discharger, whether or not by variance and whether or not it represents "secondary" treatment, it must, for the July 1, 1977 phase of the statutory program, represent "best practicable control technology currently available".

The State Board also recognized that water quality considerations cannot be utilized to grant a variance through a weighing of costs and benefits with regard to an individual mill. The Board properly rejected the companies' contention that while their costs of compliance are not substantially different[26] from the costs EPA found would be sustained on an industry-wide basis, their costs *weighed against the local water quality benefits* justify a variance. The legislative History of the Act firmly rejects any individualized cost/benefit analysis, and no court has ever required it.[27]

Crown Simpson and Louisiana-Pacific also contend that the phrase "effluent reduction benefits" in Section 304(b)(1)(B) means "receiving water quality improvement" and, further, that EPA conceded as much in its brief filed in *Weyerhaeuser Co. v. Costle* (No. 76-1674) now pending in the U.S. Court of Appeals for the D.C. Circuit. But, as explained by Senator Muskie:

> The modification of subsection 304(b)(1) is intended to clarify what is meant by the term "practicable". The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction is wholly out of pro-

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26. Opinion p. 14.

27. *See* Leg. Hist. at 170 (statement of Senator Muskie). *See also* Leg. Hist. at 304, 309 (Conf. Rept.). The Fourth Circuit in *Appalachian Power Co. v. Train*, 545 F.2d 1351 [9 ERC 1033] (4th Cir. 1976), although it found the variance clause too narrow, noted that:

> In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in [duPont v. Train, 541 F.2d 1018 (4th Cir., 1976)], an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved. 545 F.2d at 1360, n. 23.

In arguing that *Appalachian Power* stands for the proposition that water quality benefits must be considered in variance decisions Crown Simpson and Louisiana-Pacific ignore this (and other) pertinent language of that case.

portion to the costs of achieving such marginal level of reduction for any class or category of sources.

The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, *and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls,* or to determine the economic impact of controls on any individual plant in a single community.

Leg. Hist. at 170 (emphasis added). See also Leg. Hist. at 304, 309 (Conf. Rept.).

Thus, it is clear that consideration of effluent reduction benefits does not entail consideration of local receiving water quality improvement. Nothing in EPA's brief in *Weyerhaeuser* is to the contrary.[28] Moreover, the Development Document, at page 566,

28. On pages 50-51 of that brief any notion to the contrary was explicitly repudiated:

> Petitioner's suggestion that the method by which the pollutant parameters for the pulp and paper industry were selected is inconsistent with EPA's argument that it may not base effluent limitations on receiving water quality is also without merit. As discussed at length in Section VI of the Final Development Document, EPA based its selection of pollutant parameters on its consideration of a number of factors. Petitioners correctly note that one of those factors was the environmental harm caused by the particular pollutant. But it must be emphasized that the Agency's evaluation of that factor was limited to a consideration of harmfulness in a generic sense. That analysis is far different from the site-specific water quality assessment which petitioners would require of the Agency. EPA has never required, nor has any Court, that the pollutants it regulates have an equally harmful effect in all water bodies. That BOD and pH are generally harmful is not disputed by petitioners and is documented in the record.
>
> Moreover, harmfulness was only one element in EPA's selection of BOD and pH for the paper industry. At least as important a factor was the historic measurement of those two parameters by the industry itself—including mills with marine discharges. BOD was selected for the additional reasons that the BOD5 test provides an indirect measure of other pollutants in mill waste streams and that systems for the removal of BOD also remove these other, indirectly measured pollutants, including long term BOD, oil and grease, foam, and a number of compounds which contribute to toxicity. There is nothing inconsistent between this analysis and the general legislative history forbidding the establishment of effluent limitations based on the assimilative capacities of receiving waters. (footnotes and citations omitted.)

shows that EPA analyzed "Costs of BPCTCA vs. Effluent Reduction Benefits" not in terms of receiving water quality improvement but in terms of the amount of pollution removed from discharges.

Where the State Board erred was in finding grounds for variances on the basis of non-water quality environmental impacts. As I have already observed, the Board did not find these impacts, of themselves, to be fundamentally different from the impacts considered on a national basis. Instead, the Board found these impacts to be the basis for variances when weighed against, or considered in light of, the lack of environmental improvement. Crown Simpson and Louisiana-Pacific argue in their comments that the State did not rely upon local water quality considerations in its decision and that it did in fact find a fundamental difference in terms of non-water quality impact alone. But the companies cite only to State observations that there would be non-water quality environmental impacts as a result of compliance with EPA effluent limitations guidelines, not to any finding of *fundamental difference* on this point.[29]

29. Extensive analyses of the non-water quality environmental impacts of the effluent limitations guidelines for the pulp and paper industry, including sludge landfilling and incineration, air pollution, noise effects, and energy impacts, were performed by EPA and are reflected in the Development Document. See, e.g., pages 349-354, 433-440, 480-483, 490-494, 504-506, 512, 524-538.

Perhaps one reason why no finding of fundamental difference in non-water quality environmental impact alone was found by the State was the testimony of Dr. Herman R. Amberg, Director of Environmental Sciences for Crown Zellerbach Corporation (part owner of the Crown Simpson Company), a witness on behalf of Louisiana-Pacific and Crown Simpson. In response to questions posed by Mr. Sam Johnson, a staff engineer for the State, at the December 22, 1976, hearing he said: (Tr. 79, 80, 82):

I find the State's conclusion as to the propriety of granting the variances to be based on non-water quality environmental impacts only in light of water quality considerations, and not independently.[30]

Mr. JOHNSON: Q. With regard to the issue of variance fundamental differences, is there any difference in your plant and the plants that were examined by EPA with regard to age of the facilities that would support a variance?

A. No, sir.

Q. The process employed?

A. It's essentially the same process.

Q. The engineering aspects of the control technology?

A. I don't think so. I'm not that familiar with the 25 mills that they used.

Q. The process changes required by the guidelines?

A. I'm not sure.

Q. Is the installation of the technology specified by EPA in the development document as BPCTCA within the economic capacity of your company?

A. Yes.

Q. How does your plant compare in the area of non-water quality environmental impacts with the plants that EPA utilized in developing the guidelines?

A. I don't think there's that much difference. However, I should point out, too, that those plants that EPA considered, there was a need for secondary treatment in that they did improve water quality. There was a bona fide need for improvement of the water quality while here there will be no benefit as far as water quality is concerned.

Dr. Amberg's comments apply equally to the two mills. His counsel asked him: "And just to clarify for the entire part of your testimony, are the Louisiana-Pacific and Crown Simpson Mills sufficiently similar so that what you have testified to with respect to Crown Simpson would equally apply to Louisiana-Pacific?" His response was "Yes." (Tr. 67, 68.)

30. However, I do find well taken the companies' admonition that I should not make a finding that the State *could not* had it properly interpreted the Act, have found fundamental difference with regard to non-water quality environmental impact. I have not independently reviewed the factual record. I therefore express no opinion as to whether the two mills could be found fundamentally different in terms solely of non-water quality environmental impact. This is a matter properly addressed in the first instance by the State. Further, this decision does not stand for the proposition that fundamental difference in this factor cannot justify a variance. Concerns along this line expressed by Southern California Edison Company and others are based on a misunderstanding of the

First of all, the Act does not require that non-water quality environmental impact (or energy requirements) be weighed against environmental benefit. This factor is only to be given "consideration". Section 304(b)(1)(B).[31] Moreover, it should be obvious that where this factor is deemed fundamentally different, not in its own right but only because water quality effects are different, then the distinction between a variance granted on this basis and one granted directly for water quality reasons is only a form of words. A water quality based variance cannot be granted merely because it is in the guise of a non-water quality environmental impact based variance. *Appalachian Power Co. v. Train, supra,* does not support the State's Opinion on this point. Nothing in that court's opinion authorizes any balancing of non-water quality benefits with water quality benefits, or any localized consideration of water quality improvement. In fact, the court rejected a request by Consolidated Edison Company that it be relieved from meeting the effluent limitations for its plant because of the high cost of non-water quality environmental impacts of the regulations as applied to it as weighed against an asserted lack of water quality improvement in New York Harbor. The court responded:

> "so far as [Con Ed's] petition may be read as a request for leniency because of the already polluted condition of the harbor, it must be rejected. The 1972 amendments to the

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legal analysis which is the basis for my denial of the variance requests at issue here. There is no reason why, in a proper case, a fundamental difference in non-water quality environmental impact could not justify a variance.

31. Crown Simpson and Louisiana-Pacific argue that non-water quality environmental impact can only be considered by means of a balancing with water quality improvement and that my interpretation of Section 304(b)(1)(B) is strained. On the contrary, I read Section 304(b)(1)(B) quite faithfully. Where Congress intended one factor to be considered in relation to another, such as cost and effluent reduction benefits, it so specified. Where it did not do so I take the omission to be deliberate.

> statute changed the system from that of control of the quality of the body of water to effluent limitations as we have before noted. 545 F.2d at 1378.

Moreover, as noted previously, the Fourth Circuit specifically noted that "we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage." See note 27 *supra.* I do not understand how the opinion in the *Appalachian Power* case can be held to stand for a principle specifically disavowed by the Court.[32] In fact, the Second Circuit squarely faced this issue and held that:

> The EPA . . . need not document specifically the benefits to society from the curtailment of pollutants from a particular point source. Congress has established as a national goal the complete elimination of pollutant discharges by 1985 . . . . The EPA must lead industry toward that goal through the 1977 and 1983 standards, and the agency's discretion is necessarily broad. *California & Hawaiian Sugar Company v. Environmental Protection Agency,* 553 F.2d 280, 289 [9 ERC 2129] (C.A. 2, April 14, 1977).[33]

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32. In any event, the continuing vitality of the criticism of the variance clause in *Appalachian Power* is now in doubt in light of the recent decision of the Supreme Court in *E. I. duPont de Nemours and Co. v. Train,* 430 U.S. 112, 97 S. Ct. 965 (1977). In that case the Supreme Court reviewed an earlier decision of the Fourth Circuit concerning EPA effluent limitations and noted that "consideration of whether EPA's variance provision has the proper scope would be premature." 97 S. Ct. at 975, n. 19. *See also; Natural Resources Defense Council v. EPA,* 537 F.2d 642, 647 [8 ERC 1988] (2d Cir. 1976); *American Petroleum Institute v. EPA,* 540 F.2d 1023 [10 ERC 1252] (10th Cir. 1976).

33. *See also FMC Corp. v. Train,* 539 F2d 973, 983 [8 ERC 1731] (4th Cir. 1976) in which the court rejected the argument that EPA can only regulate pollutants which it finds to be harmful to receiving waters.

Conclusion

Providing relief from technology-based effluent limitations guidelines due solely to the characteristics of particular receiving waters is not within my authority. I am convinced that the law does not permit exemption of Crown Simpson and Louisiana-Pacific from effluent limitations guidelines on the record before me, in which I discern the type of receiving water as being the "fundamental difference" between Crown Simpson's and Louisiana-Pacific's Samoa Peninsula mills on the one hand, and other pulp and paper mills, on the other.

Accordingly, I deny the variance requests and disapprove the effluent restrictions contained in NPDES Permit No. CA0005882, paragraph B4, and NPDES Permit No. CA0005894, paragraph B5.

Appendix E

State of California

State Water Resources Control Board

In the Matter of the Review of Crown Simpson Pulp Co. and Louisiana-Pacific Corporation Orders Nos 76-133 (NPDES No. CA0005282) and 76-134 (NPDES No. CA 0005894) of the California Regional Water Quality Control Board, North Coast Region.	Order No. WQ 77-6

BY BOARD VICE CHAIRMAN MAUGHAN:

On August 26, 1976 the California Regional Water Quality Control Board, North Coast Region (Regional Board) adopted waste discharge requirements (Orders Nos. 76-133, NPDES No. CA0005282 and 76-134, NPDES No CA0005894) for Crown Simpson Pulp Co. (Crown Simpson) and Louisiana-Pacific Corporation (Louisiana-Pacific) (hereinafter sometimes collectively referred to as "dischargers"), respectively. On September 3, 1976, the United States Environmental Protection Agency (EPA) issued a letter of objection to the Regional Board orders prescribing waste discharge requirements for the discharges. On October 7, and October 27, 1976, Crown Simpson and Louisiana-Pacific, respectively, filed petitions in the Ninth Circuit Court of Appeal requesting the Court to overturn the action of the Administrator of EPA, Region IX, in objecting to the granting of a variance by the Regional Board. On October 21, 1976, the State Water Resources Control Board (State Board) adopted Resolution No. 76-108 to review the action of the Regional Board On December 22, 1976, the State Board held a hearing regarding the establishment of appropriate waste discharge requirements for the dischargers.

I. BACKGROUND

The dischargers each operate bleached kraft pulp mills located on the Samoa Peninsula, on the west side of Humboldt Bay. Louisiana-Pacific also operates a saw and plywood mill at this location. Louisiana-Pacific was formed in September 1972 from a portion of Georgia-Pacific Corporation.

Each pulp mill produces about 600 air dry tons per day of bleached kraft pulp. The Louisiana-Pacific saw mill produces about 500,000 board feet per day of lumber. Each mill primarily discharges through a separate ocean outfall about 2,500 feet long with the diffuser located at a depth of 30-40 feet. The outfalls are about one mile apart.

The dischargers are presently discharging under waste discharge requirements issued by the Regional Board on September 4, 1968. Monitoring and reporting is being done under the requirements of Monitoring and Reporting Programs Nos. 74-211 (Crown Simpson) and 74-212 (Louisiana-Pacific) which were issued December 31, 1974, effective February 1, 1976.

On December 4, 1974, the Regional Board adopted waste discharge requirements for the dischargers. At that time formally promulgated EPA effluent limitations guidelines were not available. EPA objected to the Regional Board orders on the basis that the Regional Board failed to implement fully the provisions of Section 301 of the Federal Water Pollution Control Act[1] by not imposing effluent limitations which would require achievement of "best practicable control technology currently available" (BPCTCA) by July 1, 1977.

Subsequently, the State Board reviewed the Regional Board orders both on its own motion and in response to petitions filed by each of the dischargers. The State Board, after receiving evidence at a hearing on March 7, 1975, remanded the orders to the

1. 33 U.S.C. 1251 *et seq.*

Regional Board with the direction that effluent limitations based on BPCTCA be included. If formally promulgated guidelines were available, they were to be applied. Otherwise, the Regional Board, after considering all relevant evidence, was to establish limitations based on its best judgment of what constituted BPCTCA.

On February 19, 1976, EPA promulgated Effluent Limitations Guidelines and Standards, Pulp, Paper, and Paperboard Point Source Category (Guidelines)[2]. The Guidelines contain a variance provision for each subcategory of this Point Source Category. The variance provision is set forth, in pertinent part, at page 5 of this Order. On July 6, 1976, various corrections to the Guidelines (mostly of typographical errors) were promulgated. On January 6, 1977, EPA further modified the Guidelines. The effect of this latest modification on these dischargers is limited to a slight relaxation of the limitations on BOD5 and total suspended solids.

After hearing extensive testimony at its June 24, 1976, July 29, 1976, and August 26, 1976, meetings, the Regional Board adopted Order No 76-133 (NPDES CA0005282) for Crown Simpson and Order No. 76-134 (NPDES CA0005894) for Louisiana-Pacific on August 26, 1976.

On September 3, 1976, EPA issued a letter of objection to the Regional Board orders. Grounds cited by EPA were inclusion of effluent limitations less stringent than the Guidelines without prior approval by the Administrator. It appears that EPA's objection on procedural issues could have been precluded had the Regional Board orders included Guideline limitations and provisions that the alternate limits for BOD and pH would become effective only upon approval by the Administrator.

II. ISSUES AND FINDINGS

The dischargers requested (and the Regional Board granted) a variance from the EPA Guidelines for BOD and pH based

2. Title 40, Code of Federal Regulations, Part 430.

both on a claim of "fundamental difference" in accordance with the variance provisions of the Guidelines and on precedent established in the decisions of several U.S. Courts of Appeals; particularly the Fourth Circuit's decision in the case of *Appalachian Power Company v. Train*[3] (hereinafter, *Appalachian*). The dischargers have also requested several variances from Ocean Plan requirements.[4] Finally, they have raised a procedural objection to the State Board's resolution of the question as to whether a variance from EPA Guideline limitations is appropriate at this time. The dischargers contend that the State Board should not take action on this question pending resolution in the Federal courts of certain lawsuits involving the validity of EPA's Guidelines and variance provisions. Each of the dischargers' contentions will be discussed separately below.

1. *Contention that the Dischargers' Facilities are Fundamentally Different in that they Discharge to Ocean Waters.*

The dischargers argue that the fact that they discharge to the ocean with its vast diluting and buffering capacity is sufficient for a finding of "fundamental difference" under the variance provision of EPA's Guidelines. They base this on the following portion of the currently applicable variance provision:

> "An individual discharger . . . may submit evidence . . . that . . . factors relating to the equipment or facilities involved, the processes applied, or *other such factors* related to such discharger are fundamentally different from the factors considered in the establishement of the guidelines." (Emphasis Added)

Since none of the bleached kraft pulp mills considered by EPA in the process of Guideline development discharge to the ocean,

3. 545 F. 2d 1351.

4. Water Quality Control Plan for Ocean Waters of California adopted by the State Board on July 6, 1972.

the dischargers contend that this fact alone is sufficient to establish fundamental difference.

The State Board disagrees with the contention of petitioners that a variance from the Guidelines based upon a finding of fundamental difference should be granted because of the type of receiving water. This position is supported by the following quotations from the Legislative History of the Federal Water Pollution Control Act:

> "The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology only where the additional degree of effluent reduction benefits is wholly out of proportion to the costs of achieving such marginal level of reduction for any class or category of sources.
>
> "The Conferees agreed upon this limited cost-benefit analysis in order to maintain uniformity within a class and category of point sources subject to effluent limitations, and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, or to determine the economic impact of controls on any individual plant in a single community."[5]
>
> * * *
>
> ". . . the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines . . . so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into

5. Exhibit 1 to the remarks of Senator Muskie, Senate Consideration of the Report of the Conference Committee, as set forth in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, Congressional Research Service, Library of Congress, Vol. 1, January 1973, at 170.

> which the discharge is made, will meet similar effluent limitations."[6]

The argument advanced by the dischargers (variance based on type of the receiving water) is, in our opinion, the essence of what Congress intended to avoid with the Federal Water Pollution Control Act Amendments of 1972. The legislative history of the Amendment reflects a conclusion that regulation of pollution based on a comparison of cost with receiving water benefits on a plant by plant basis was unworkable from a practical regulatory standpoint. Congress based the Amendments on pre-defined minimum levels of treatment technology which were to be applied regardless of the type of receiving water.

2. *Contention that Biochemical Oxygen Demand (BOD) and pH do not Constitute Pollutants in this Specific Case and that the Present Dischargers have no Adverse Environmental Effects.*

The dischargers presented extensive evidence both before the Regional Board and before the State Board that there are no adverse environmental effects associated with their present discharges. Dr. Joseph, Regional Board Executive Officer, agreed that he knew of no evidence that indicates that, in the case of these two discharges, BOD is a problem.

The State Board publication *Water Quality Criteria*[7] states:

> "In itself, BOD is not a pollutant and exercises no direct harm. Only by depressing the dissolved-oxygen content to levels that are inimical to fish life and other beneficial uses does BOD exert an indirect effect. Where reaeration, dilu-

6. Conference Report, House-Senate Conference Committee, discussion of Section 304 of the conference substitute, as set forth in *A Legislative History of the Water Pollution Control Act Amendments of 1972*, op. cit., note 5, at page 309.

7. McKee and Wolf, *Water Quality Criteria*, Second Edition, State Water Resources Control Board, Pub. No. 3A, Reprint June 1, 1976, at page 147.

tion, and/or photosynthetic action offset or minimize this depletion, BOD does not interfere with the reasonable uses of the water."

Thus, while some of the organic compounds which contribute to the BOD may cause problems in the receiving water, the State Board does not dispute the dischargers' contention that BOD, in and of itself, is not a pollutant when properly discharged into a marine environment. Further, the record contains no evidence to contradict this conclusion, and there is evidence that the dissolved oxygen content of the seawater is not depressed to any noticeable degree outside the initial dilution zone.

The dischargers have also submitted substantial evidence that the discharge of waste outside the 5-9 pH range permitted by the EPA Guidelines has no effect on a marine environment.

The EPA Development Document[8] cites no adverse effects of pH that would be of concern in the marine environment.

Concerning pH, *Water Quality Criteria*[9] also states:

"Conversely, the concentration of weakly dissociated acids and bases markedly affects the pH value and the ease with which it can be altered. For this reason, pH should not be confused with acidity and alkalinity. The presence of carbonates, phosphates, borates, and similar ions give water a buffering power so that the addition of an acid or base is less likely to be deleterious."

It cannot be said that the discharge from these two plants is exceptionally low in either acidity or alkalinity, but the buffering capacity of seawater is so strong that there is no reason to doubt

8. Development Document for Advanced Notice of Proposed or Promulgated Rule Making for Effluent Limitations Guidelines and New Source Performance Standards for the Bleached Kraft, Groundwood, Sulfite, Soda, Deink, and Non-integrated Paper Mills Segment of the Pulp, Paper, and Paperboard Mills, August 1975.

9. Op. Cit., footnote 7, at page 235.

the testimony of the dischargers' experts that the receiving water pH is not changed more than 0.2 units outside the initial dilution zone. Thus, with pH, also, there is no evidence in the record to dispute the dischargers' allegation that the high or low pH of their discharges causes no problem when diffused into seawater.

In summary, it has been clearly shown, in this particular case, that neither the discharge of BOD nor pH results in a discernible impact or a threat of damage to the marine environment. EPA in its Development Document cites the reasons why it has selected BOD and pH as pollutants to be controlled in the discharge from pulp mills. The discussion of BOD effects in the Development Document indicates that BOD must be controlled because it depresses dissolved oxygen levels resulting in damage to fish populations (such as delayed hatching of eggs and decreased tolerance to certain toxicants) and damage to fish food organisms. The Development Document points out that death may result if dissolved oxygen is reduced severely by high levels of BOD.[10] The discussion of pH effects in the Development Document indicates that low pH water supplies may corrode household plumbing and, thus, add heavy metals to drinking water supplies. Extremes of pH or rapid changes in pH may stress or kill acquatic life and toxicity of many materials is increased by changes in pH.[11] As the above discussion indicates, the reasons cited by EPA for the Guideline BOD and pH requirements are not valid in this case. The dischargers have submitted adequate evidence to refute the presumptions made by EPA regarding the polluting nature of BOD and pH.

Therefore, based on the record before us, we must conclude that there do not appear to be any environmental benefits which will be derived by requiring these dischargers to meet either the Ocean Plan or Guideline limitations for BOD or pH.

10. Development Document, op. cit., note 8, at 188.

11. Id. at 192.

3. *Contention that Judicial Precedent Dictates that a Broad Range of Factors including Non-water Quality Environmental Effects and Energy Requirements be Considered in Deciding whether Guideline Numbers should be applied to a Particular Discharger*

The dischargers assert that the Regional Board and State Board should be guided in resolving the question of "fundamental difference" by the logic contained in the decision in the *Appalachian* case.

The variance provision under consideration in *Appalichian* was identical to the provision which has been promulgated by EPA for the sources under consideration here. The operative language from the variance provision is set forth at page 5 above. The court found in *Appalachian* that the provision did not allow for adequate flexibility in application of nationwide guidelines to particular point sources and remanded the variance provision to EPA for modifications which would allow for reconsideration at the permit issuance stage of all factors required by P.L. 92-500 to be considered at the time guidelines are originally developed. Specifically, the court stated:

> "As we noted in *duPont,* 541 F.2d 1018, Nos. 74-1261, et al, provisions for variances are appropriate to the regulatory process. This is particularly so in the case of regulations having presumptive applicability throughout the nation. The factors to be taken into consideration, however, ought ordinarily to be at least as broad as the factors relied upon in establishing the limitation if the provision is to have meaning. In the instant case, EPA has said that a variance from the 1977 standards will be granted only where 'the factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from those factors considered in establishing the guidelines'. Thus, only technical and engineering factors, exclusive of cost, may be considered in granting or denying a variance. Based upon the Act taken as a whole, we are of the opinion that such a variance clause is unduly restrictive and, accordingly, 40 CFR 423.12(a), must be set aside and remanded for further consideration."

* * * *

> ". . . [*w*]*e note that both* § *304 (1977) and* § *306 (new sources) provide that the factors to be taken into consideration in determining the 1977 and new source standards include not only the engineering aspects of the various types of control technology, but also (1) the total cost of application of such technology (cost of achieving such effluent reduction) and (2) the resulting non-water quality environmental impact (including energy requirements). The EPA has offered no reasoned explanation for limiting the variance clause to considerations of technical and engineering factors only. Certainly the adverse non-water quality environmental impact which may result from the strict application of the agency's effluent limitations to a particular plant is as significant as the technological difficulties which may be encountered. The same may be said for a consideration of energy requirements."*[12] (Emphasis Supplied.)

The court in *Appalachian* described, as follows, how the uniformity in effluent requirements which Congress anticipated from permit to permit within a point source category could be maintained while, nevertheless, providing for a reasonable amount of flexibility in the permit program:

> ". . . 'we believe that the solution which most nearly satisfies congressional intent is recognition that the regulations are presumptively applicable to permit applications' (citation omitted). *Thus, the issuer of a permit under* § *402 may consider whether a particular applicant is to be held strictly to the confines of the agency's regulations. The burden of proof remains upon the applicant, however. Only after he has established the inappropriateness of the regulations as*

12. Op. cit., note 3 at 1358-1359.

applied to him, for example, employing the generic factors of §§ 304, 306 or any specific variance clauses promulgated thereunder, need the permit issuer go beyond the regulations. Of course, the permit issuer does not have unreviewable discretion in determining whether limitations prescribed under a particular regulation should be deemed inapplicable to any individual point source. Under § 402(d)(2), EPA may prevent the issuance of any permit to which it objects. Thus, through the exercise of this veto power, the agency may insure that the permit grantors give proper recognition to the need for uniformity in the application of the Act while at the same time recognizing variables which may exist from location to location and plant to plant."[13] (Emphasis supplied.)

Other courts have echoed the opinion of the *Appalachian* court with regard to the need for flexibility in a regulatory program involving standards which are applied nationwide. For example, the Second Circuit in *Natural Resources Defense Council v. EPA* stated:

"Not all of the thousands of plants in operation can be expected to fit into prefabricated molds or templates. By specifying a permit procedure, Congress implicitly conferred on the permit-grantor the privilege of construing the broader regulations in light of the specific type of plant applying for the permit. Without variance flexibility, the program might well founder on the rocks of illegality."[14]

Section 304 (b)(1)(B) of the Federal Water Pollution Control Act sets out the factors which are to be considered by the Administrator of EPA in specifying effluent guidelines for BPCTCA for non-publicly owned treatment works. According to

13. Id. at 1358.

14. 537 F.2d 642 at 647. See also: *E. I. DuPont de Nemours and Co. v. Train,* 541 F.2d 1018 at 1028 (Fourth Circuit) and *American Paper Institute v. Train,* 9 ERC 1065 at 1070. (District of Columbia Circuit.)

the *Appalachian* court, as quoted above, all of those same factors must be considered again at the time of permit issuance where a discharger challenges the application of guideline limitations to his facilities. The factors listed in Section 304(b)(1)(B) are as follows:

". . . the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, . . . the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, *non-water quality environmental impact (including energy requirements),* and such factors as the Administrator deems appropriate."[15] (Emphasis Supplied).

There have been no decisions in the Ninth Circuit which would indicate the proper application of variance regulations as a part of the NPDES permit program and we, of course, are not bound, in a strict legal sense, by the Fourth Circuit's decision in *Appalachian.* However, the *Appalachian* decision does leave a cloud on the continued viability of all variance provisions containing the same language as the provision considered in *Appalachian.* Further, we find the reasoning in the *Appalachian* decision compelling. Therefore, in the following discussion we evaluate the dischargers' arguments with regard to their entitlement to a variance based upon the costs, the non-water quality environmental impacts and the energy requirements of compliance with Guideline limitations.

4. *Contention that the Costs are Disproportionate to the Water Quality Benefits and thus justify the Issuance of a Variance.*

The dischargers introduced evidence that it would cost approximately $18\frac{1}{4}$ million for each facility for construction of the necessary treatment facilities to meet all Guideline and Ocean Plan limitations with the exception of the Ocean Plan chromium

15. 33 U.S.C. 1314(b)(1)(B).

requirements. Operation and maintenance costs are expected to be $1¼ million per year for each plant. Therefore, the total capital expenditure would be $36.5 million with an annual operation cost of $2.5 million. These costs are in addition to the costs which have already been incurred by the dischargers in constructing their existing ocean outfalls and diffusers. These costs were approximately $2 million each and represent costs which are not required by the Guidelines and would generally not be imposed upon similar discharges to a freshwater stream. The expected costs are substantial in that the original mills together cost approximately $110 million.

The dischargers contend that a variance should be granted because if the Guideline limitations are imposed they will sustain the above costs with no discernible water quality benefit. However, it should be noted that with regard *to economic* costs the *Appalachian* case found that a narrow consideration was required at the permitting stage.

In *Appalachian* the court specifically found that it was not necessary for EPA to provide for an analysis of economic costs versus water quality benefits on a plant-by-plant basis at the permit issuing stage, but that provision should be made for consideration of cost differentials between the guideline plants and the particular plant for which a permit is sought. Specifically, the court stated:

> "In requiring that EPA give weight to the relevant statutory factors in developing a subsequent variance provision, we in no way intend to imply that EPA's regulations must provide for a detailed cost-benefit analysis at the permit granting stage. As we indicated in du Pont, 541 F.2d 1018, Nos. 75-1261, et al., an overall cost-benefit analysis for each category or subcategory satisfies the mandate of § 304 in this regard. The variance provision should, however, allow the permit issuer to consider significant cost differentials of the particular point source involved."[16]

16. *Appalachian, op. cit.*, note 3, at footnote 23, page 1360.

In this case, the dischargers have offered no evidence that the costs which they would sustain to meet the Guidelines are substantially different from the costs EPA found would be sustained on an industry-wide basis, and we find that with regard to economic costs, the dischargers have not sustained the burden of proof required in order to overcome the presumptive applicability of the Guideline limitations.

5. *Contention that the Adverse Non-water Quality Environmental Effects and Energy Requirements justify the Issuance of a Variance.*

In support of their position, the dischargers submitted evidence regarding the chemicals required, the direct and indirect power requirements, and potential sludge disposal problems. In summary the evidence is:

1. Chemical requirements: The chemical requirements for each facility are estimated to be approximately 4,320 tons per year of caustic soda, 546 tons per year of anhydrous ammonia, and 335 tons per year of phosphoric acid. Therefore, the total chemical requirements for both plants would be 8,640 tons per year of caustic soda, 1,092 tons per year of anhydrous ammonia, and 670 tons per year of phosphoric acid.

2. Energy requirements: For each facility the energy requirements would be 42,121,000 KWH/yr for construction (direct and indirect amortized over a 15 year period), 24,183,000 KWH/yr for operation of the facility for BOD removal, and 7,812,000 KWH/yr for the production of the necessary chemicals. Therefore, the total energy requirements for both plants would be 148,232,000 KWH/yr.

3. The process of BOD removal would result in 4,200 tons per year of biological sludge from each plant which, because of the unique situation of the dischargers' location on a sand spit in a heavy rainfall area, represent a very difficult problem regarding satisfactory means of disposal.

With regard to the consumption of energy, at the present time the generating capacity of the north coastal area only marginally exceeds the demand during the peak, mid-winter demand period. Additional demand will aggravate this energy problem. To supply the total annual demand, both direct and indirect, associated with the removal of BOD and pH adjustment at both plants would require the burning of 200,000 barrels of low sulphur fuel oil. The dischargers allege that burning of this amount of oil would result in two million pounds of air pollutants. This amount of power would supply approximately 21,000 homes.

With regard to the sludge disposal problem, it is not probable that a suitable disposal site can be located near the pulp mills because of the sandy nature of the Samoa Peninsula. If truck hauling is required, additional energy would be required. The alternative of incineration of sludge would also require energy and may result in air pollution.

On the other hand, as previously discussed, the dischargers have shown there is no expected environmental benefit to be gained by installation of the treatment facilities necessary to comply with the BOD and pH limitations.

In appraising the evidence related to non-water quality environmental effects and energy requirements the Board must at least in part appraise the significance in terms of the potential environmental benefits to be gained as a result of the imposition of the EPA Guidelines. In this case we have unrefuted evidence presented by the dischargers and concurred with by the Regional Board Executive Officer that the existing discharges result in no water quality problems. Secondly, there is no expected or predictable water quality improvement to be achieved as the result of imposition of the EPA Guidelines. In light of these facts (the magnitude of the chemical and energy requirements, and the potential air and land management problems associated with

sludge disposal) we can only conclude the evidence justifies the variance requested.[17]

In granting the requested variance, we are mindful of the intent of Congress in adopting the Federal Water Pollution Control Act that the regulation of discharges to the waters of the United States from similar dischargers be *as uniform as possible.* We feel that the concept of "presumptive applicability" of guidelines as enunciated by the Fourth Circuit in *Appalachian* provides for maintenance of this uniformity. Further, we feel that a flexible variance procedure such as that required by the Fourth Circuit will strengthen, rather than weaken, the regulatory process. As was stated by the District of Columbia circuit in *Portland Cement Association v. Ruckleshaus,*[18] ". . . a regulatory system

17. The alternative BOD and pH limitations contained in the permits attached to and adopted by this order are identical to the limitations for those constituents contained in the Regional Board orders. Those limitations are as follows:

Louisiana Pacific			
Constituent	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	48,000	97,600
pH	within the limits 3.0 and 10.0		

Crown Simpson			
Constituent	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	48,000	96,000
pH	within the limits 3.0 and 10.0		

If the Guideline limitations were applied to the dischargers their BOD and pH requirements would be as follows:

Louisiana Pacific			
Constituents	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	9,821	18,849
pH	within the limits 5.0 and 9.0		

Crown Simpson			
Constituents	Units	30-day Average	Daily Maximum
BOD_5 (pulp)	lbs/day	9,660	18,540
pH	within the limits 5.0 and 9.0		

18. 486 F.2d 375 at 399, cert. denied 417 U.S. 921, followed in *Natural Resources Defense Council v. EPA,* 537 F.2d 642 at 647.

which allows flexibility, and a lessening of firm proscriptions in a proper case, can lend strength to a system as a whole. 'The limited safety valve permits a more rigorous adherence to an effective regulation. . . .'"

6. *Contention that Dischargers should be Granted Variance from the Ocean Plan.*

The dischargers have accepted the Guideline limitations for the suspended solids discharged by their pulp mills (turbidity is not a guideline parameter). They have requested that a variance from Ocean Plan[19] Table A limitations for suspended solids be granted (relaxation of limitations down to the level required by the Guidelines), and that the limitations on suspended solids and turbidity be applied only to waste generated in the pulp mills. Each company buys untreated Mad River water from the Humboldt Bay Municipal Water District and operates a water treatment plant to clarify, filter, and soften the water. The dischargers contend that wastes generated in the water treatment facilities consist almost entirely of material that would have been deposited in the ocean by the Mad River had the water not been diverted.

We agree that, in this instance, it is proper to apply the suspended solids limitations on a net basis. There is ample evidence in a record to support granting the variance requested from Ocean Plan, Table A, and to support application of effluent limitations for suspended solids contained in the Guidelines on a net basis.

Since it is extremely difficult to measure turbidity on a net basis and since the waste streams from the manufacturing processes typically have low turbidity, it is appropriate that no turbidity limitations be imposed.

19. See Footnote 4.

The dischargers have presented ample evidence that settleable solids and floating particulates need not be specifically controlled in this instance because all applicable water quality objectives can be met without imposing such controls. The dischargers have, further, presented ample evidence that the discharge of wastewater with pH within the limits of 3.0 to 10.0 will result in compliance with all applicable water quality objectives.

At the State Board hearing on December 22, 1976, the dischargers indicated that they would meet the limitations for grease and oil, toxicity, heavy metals (other than chromium), and phenolic compounds. Thus, no relief from the Ocean Plan limitations for these parameters is necessary.

We are aware of the difficulties involved in compliance with the Ocean Plan limitations for chromium and it is likely that the limitation will be changed as a result of the Ocean Plan review before the Table B limitations become effective. It is clear that the requirements for postponement of the compliance date contained in the Ocean Plan have been met and hence such an extension of time should be granted even though revision of the Plan is likely.

7. *Contention that a Decision by the State Board should be Held in Abeyance pending the Outcome of Litigation.*

We find no merit in the dischargers' request that their petition be held in abeyance pending the outcome of litigation in the federal courts regarding EPA's authority to issue relatively inflexible guidelines. We have been authorized to administer the NPDES permit program under Section 402 of the Federal Water Pollution Control Act, and unnecessary delay in the issuance of appropriate permits for the dischargers serves no useful purpose.

Further, the United States Supreme Court's decision in the *duPont* case, one of the decisions which the dischargers asked that we await, has now been rendered. With regard to variances,

the decision does nothing more than confirm the holding of the Fourth Circuit in the *duPont* case that a provision for variances from the 1977 limitations is required.[20] It does not clarify what the scope of the variance provision should be.

III. CONCLUSIONS

After review of this matter, and for the reasons heretofore expressed, we conclude that the actions of the Regional Board in adopting Orders Nos. 76-133 and 76-134 were generally appropriate and proper except that the Regional Board adopted effluent limitations less stringent than limitations based on the presumptively applicable EPA Guidelines without allowance for the required approval by the Administrator of EPA.

IV. *ORDER*

IT IS HEREBY ORDERED THAT:

1. Regional Board Orders Nos. 76-133 and 76-134 be set aside and replaced by the waste discharge requirements attached hereto and identified as Exhibit A and Exhibit B, which are hereby adopted.

2. The Executive Officer of the State Board forward to the Administrator of EPA all necessary information, data, and documents submitted by petitioner, together with a copy of this Order.

3. The waste discharge requirements, Exhibits A and B, be remanded to the Regional Board for all purposes including, but not limited to such modifications (if any) as are necessary to bring them into conformance with the effluent limitations determined to be appropriate by the Adminstrator of EPA subsequent to his review of this Order, other future modification of requirements as may be deemed necessary, and all appropriate enforcement activities.

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20. *E. I. duPont de Nemours and Company et al. v. Russell E. Train et al.*, 45 LW 4212 at 4217.

In addition, the State Board directs the Regional Board to prepare and issue an appropriate self-monitoring program to be applied to the dischargers for which the State Board has issued the waste discharge requirements.

Finally, the dischargers are granted an extension of time until July 1, 1983, to meet the effluent quality requirement for chromium contained in the Ocean Plan.

Dated: March 17, 1977

W. DON MAUGHAN
W. Don Maughan
Vice Chairman

WE CONCUR:

JOHN E. BRYSON
John E. Bryson, Chairman

W. W. ADAMS
W. W. Adams, Member

/s/ ROY E. DODSON
Roy E. Dodson, Member

JEAN AUER
Jean Auer, Member

SUPREME COURT, U.S.
FILED
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No. 79-797

In the Supreme Court of the United States

OCTOBER TERM, 1979

CROWN SIMPSON PULP COMPANY AND LOUISIANA-PACIFIC CORPORATION, PETITIONERS

v.

DOUGLAS M. COSTLE, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1979

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v.

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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 599 F. 2d 897. The decision of the Administrator of the Environmental Protection Agency (Pet. App. 24-53) is reported at 10 E.R.C. 1841.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. A petition for rehearing was denied on October 15, 1979 (Pet. App. 22). The petition for a writ of certiorari was filed on November 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a final action of the Environmental Protection Agency denying a variance and vetoing a National Pollutant Discharge Elimination System permit issued by an authorized state agency is directly reviewable in the court of appeals under Section 509(b) of the Clean Water Act, 33 U.S.C. 1369(b).

STATEMENT

Pursuant to Section 301 of the Clean Water Act[1] (the Act), 33 U.S.C. (and Supp. I) 1311, the United States Environmental Protection Agency (EPA) has promulgated regulations limiting the amount of effluent that can be discharged into navigable waters. Requirements for particular discharges are implemented through National Pollutant Discharge Elimination System (NPDES) permits. Under the Act, EPA issues NPDES permits directly, except in those states where EPA has approved state administration of the NPDES program. 33 U.S.C. (and Supp. I) 1342(b) and (c). California's program has received EPA approval, and the California State Water Resources Control Board (the State Board) is therefore authorized to grant NPDES permits. However, EPA must be notified of all actions taken regarding permit applications and, if it acts within ninety days, EPA may veto the issuance of any permit. 33 U.S.C. (and Supp. I) 1342(d)(2).

Petitioners, who operate bleached kraft pulp mills located near Eureka, California, initially sought NPDES permits from the California Regional Water Resources Board, North Coast Region (the Regional Board). The Regional Board proposed to issue permits to petitioners

[1]This Act was generally known as the "Federal Water Pollution Control Act" until it was amended by the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566.

on August 26, 1976. On September 3, 1976, the Director of EPA's Region IX Enforcement Division objected to the proposed permits because they did not require petitioners to achieve effluent limitations based upon the best practicable control technology then available, as required by 33 U.S.C. 1311(b)(1)(A). Petitioners each sought direct review of EPA's action in the court of appeals in Nos. 76-3161 and 76-3287 (Pet. App. 2-4).

Petitioners thereupon asked the State Board for variances from EPA effluent guidelines. On March 17, 1977, the State Board granted variances, which were explicitly subject to EPA approval, and proposed to issue permits based on those variances. On May 26, 1977, the EPA General Counsel issued a Recommended Decision of the Administrator recommending denial of the variances. 42 Fed. Reg. 28167-28172 (1977). On September 15, 1977, the EPA Administrator issued a final decision denying petitioners' variance requests and disapproving the State's proposed permits (Pet. App. 24-53). The decision was based upon a review of the extensive record compiled during the state proceedings, briefs submitted by petitioners and written comments on the recommended decision (Pet. App. 24-26).

Petitioners sought review in No. 77-3322 of the Administrator's refusal to approve the state-proposed variances. They claimed jurisdiction under the direct review provisions set forth in Section 509(b)(1)(E) and (F) of the Act, 33 U.S.C. 1369(b)(1)(E) and (F).[2] The court of appeals held that it did not have jurisdiction to consider the claim. The court concluded that Subsection

[2]EPA originally contended that jurisdiction existed under Subsection (E) and later, in the joint petition for rehearing, it agreed that jurisdiction would also lie under Subsection (F).

(E), which governs review of an action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316," did not apply here, since the Administrator did not approve or promulgate anything, but instead rejected a proposed permit (Pet. App. 4, 5, 8). The court also found that Subsection (E) applied to generalized effluent limitations affecting whole categories of plants, rather than to adjudications affecting single plants (Pet. App. 9-10).

Subsection (F) provides direct review of an EPA Administrator's action "in issuing or denying any permit under section 1342 of this title." The court followed its previous decision in *State of Washington* v. *EPA* (*Scott Paper*), 573 F. 2d 583 (9th Cir. 1978), which held that Subsection (F) applied to the Administrator's own action in issuing or denying a permit, but not to his veto of a state's issuance of a permit (Pet. App. 10-14). Accordingly, the court dismissed the petitions for review without reaching the merits.

Judge Renfrew concurred (Pet. App. 15-21) on the ground that *Scott Paper* was controlling. However, he went on to urge the court to convene en banc to reconsider *Scott Paper*, which he felt to be wrongly decided. Judge Renfrew concluded that the policies of the Act were best effectuated by reading "denying [a] permit" to include objecting in writing to a permit and thus that Subsection (F) conferred jurisdiction on the court of appeals.

Petitioners and the United States filed a joint petition for rehearing and suggestion for rehearing en banc on the jurisdictional question, which was denied on October 15, 1979 (Pet. App. 22).

DISCUSSION

The petition in this case raises the question of the appropriate forum for reviewing final EPA actions in states that administer approved NPDES permit systems.[3] We believe that the decision below is erroneous on two counts, one of which creates a conflict in the courts of appeals. We note, however, that the continuing importance of the issue may be affected by the intervening passage of amendments to the Clean Water Act in 1977.

1. The decision below and the Ninth Circuit's earlier decision in *State of Washington* v. *EPA* (*Scott Paper*), 573 F. 2d 583 (9th Cir. 1978), both relied upon decisions of the Second and Fifth Circuits holding that direct court of appeals review of EPA's failure to object to a permit granted by a state agency was not available under Section 509, 33 U.S.C. 1369. *Save the Bay, Inc.* v. *EPA*, 556 F. 2d 1282 (5th Cir. 1977); *Mianus River Preservation Committee* v. *EPA*, 541 F. 2d 899 (2d Cir. 1976). As Judge Renfrew points out (Pet. App. 17-19), these decisions do not support the decision of the court of appeals. EPA's failure to object to state issuance of a permit requires no more than silent acquiescence for the 90-day statutory period. Accordingly, failure to object would not necessarily be "Administrator's action" within the meaning of Section 509(b)(1). Moreover, because no action is taken, it is likely that no administrative record amenable to review would result from a decision not to object to a state-issued permit. See *Save the Bay, Inc.* v. *EPA*, *supra*, 556 F. 2d at 1291-1292. In contrast, when the Administrator vetoes a state permit that is based

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[3]The Court is presently considering an analogous jurisdictional issue under the Clean Air Act in *Harrison* v. *PPG Industries, Inc.*, cert. granted, No. 78-1918 (Oct. 1, 1979). Because of differences in the two statutes, the decision in *Harrison* will not resolve the question presented in this case.

upon a variance, he has clearly taken an action, and an administrative record will have been prepared the same as if EPA were denying a permit directly as it does in states that do not administer their own program. Indeed, the Second Circuit stated in dictum in *Mianus* that an EPA veto clearly would be reviewable under Section 509(b)(1). 541 F. 2d at 909.

Apart from the dictum in *Mianus*, the decision of the court of appeals squarely conflicts with the Sixth Circuit's decision in *Ford Motor Co.* v. *EPA*, 567 F. 2d 661, 668 (1977), which held that an EPA veto of a state-granted NPDES permit was directly reviewable under Section 509(b)(1)(F). This holding was reaffirmed subsequent to the decision in *Scott Paper* in *Republic Steel Corp.* v. *Costle*, 581 F. 2d 1228, 1230 n.1 (6th Cir. 1978). Thus, it appears that the conflict between these two circuits will not be resolved without action by this Court. Finally, in *Shell Oil Co.* v. *Train*, 585 F. 2d 408 (1978), a different panel of the Ninth Circuit stated in dictum that an EPA veto of a state-issued variance would be "reviewable in this court under 33 U.S.C. §1369(b)(1)." 585 F. 2d at 412.

2. The decision of the court of appeals established a two-tiered system of review that must result in delays in resolving disputes under the Act, frustrating the purpose of Section 509(b)(1). See *Central Hudson Gas & Electric Corp.* v. *EPA*, 587 F. 2d 549, 557 (2d Cir. 1978). Moreover, there is no practical difference between a direct EPA denial of a permit or the veto of a state-issued permit considered here. The effect of both actions is to deny the permit within the meaning of 33 U.S.C. 1369(b)(1)(F). The bizarre result of the decision of the court of appeals is that some permit denials will be challenged in district court and others directly in the

court of appeals, depending on whether the state where the plant is located administers an approved permit system. The court of appeals does not suggest any policy reason for this distinction other than that Congress may have intended to divide the burden of "this potentially staggering new caseload between the district courts and the courts of appeals" (Pet. App. 14). Nothing in the legislative history or the Act itself suggests that Congress intended such a division of review; rather, Congress' desire was for a unified review system at a single level to prevent delay in the achievement of the Act's goals. See *E.I. du Pont de Nemours & Co.* v. *Train*, 528 F. 2d 1136, 1141-1142 (4th Cir. 1975), aff'd, 430 U.S. 112 (1977). As this Court found in a slightly different context, it is "unlikely that Congress intended such bifurcated review" under the Act. 430 U.S. at 128 n.18.

3. Section 402 of the Clean Water Act was amended in 1977, after the permit in this case was denied, to provide that:

> (d)(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

33 U.S.C. (Supp. I) 1342(d)(4). This power was granted to EPA "in order to avoid the impasse" that existed when EPA vetoed a state-issued permit and the state did

not then issue a new permit consistent with EPA guidelines. S. Rep. No. 95-370, 95th Cong., 1st Sess. 73 (1977). The Conference Report makes clear that "the Administrator is expected to use the authority given by this amendment to issue a permit after objecting to a State-issued permit." H.R. Conf. Rep. No. 95-830, 95th Cong., 1st Sess. 97 (1977). Under the law, as amended, an EPA veto of a state permit is therefore essentially a preliminary action to issuance of a final permit under 33 U.S.C. (Supp. I) 1342(d)(4) and thus should not be reviewable until the permit issues. See 44 Fed. Reg. 32877-32878 (1979). The Conference Report explicitly states that "any litigation over the degree of effluent reduction required for a source should take place in the context of judicial review of the permit, rather than in the context of an enforcement action." H.R. Conf. Rep. No. 95-830, *supra*, at 97. Thus, the question of the proper forum for review of a veto of a state permit may not be of much future importance.

If the veto is still reviewable after the 1977 amendments, however, the Conference Report makes it clear that review is to be directly in the court of appeals. "Judicial review arising out of this provision would be in the same manner as judicial review of any EPA issued 402 permit" (*ibid.*) which is in the court of appeals under 33 U.S.C. 1369(b)(1)(F).

4. The court of appeals also held that Section 509(b)(1)(E) did not authorize direct review in the court of appeals of an EPA denial of a variance, and no court of appeals has specifically held to the contrary. The court held that an EPA denial of an individual variance was not covered by Subsection (E) because that refers only to general effluent guidelines. This theory is at odds with this Court's suggestion in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 (1977), that a variance

granted under Section 301(c) of the Act is directly reviewable in the court of appeals under Subsection (E). See also *Weyerhaeuser Corp.* v. *Costle*, 590 F. 2d 1011, 1033 n.29 (D.C. Cir. 1978). The court distinguished these cases on the ground that an EPA objection to a state-proposed variance is to be treated differently from an EPA denial of a variance (Pet. App. 10-11 n4).[4]

First, the court suggests no justification for this distinction. More importantly, the court erred in failing to recognize that, unlike permits, variances "must be approved" by EPA—states have no authority to issue variances. See 40 C.F.R. 430.72. Thus, EPA's action was an EPA denial of a variance and must be reviewable directly in the court of appeals under Subsection (E). In light of the absence of a conflict, however, we do not urge that the Court grant plenary review at this time in respect of this question.

5. In the circumstances, we do not oppose the granting of the petition for certiorari. The Court may wish to consider, however, whether summary reversal would be appropriate.[5]

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[4]The court also relied on the fact that Section 301(c) applies only to permit applications filed after July 1, 1977, but the variance in this case is not sought under Section 301(c) but under the variances established by regulation for the 1977 limitations.

[5]We note that, if certiorari is granted, all parties will be urging reversal. If the Court deems plenary consideration appropriate, it may wish to consider the appointment of counsel to appear as amicus curiae in support of the judgment below. See *Granville-Smith* v. *Granville-Smith*, 348 U.S. 885 (1954), 349 U.S. 1, 4 (1955); cf. *Menominee Tribe* v. *United States*, 390 U.S. 916, 391 U.S. 404, 407 (1968).

Respectfully submitted.

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v.

DOUGLAS M. COSTLE, Administrator,
Environmental Protection Agency,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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January 31, 1980

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-797

CROWN SIMPSON PULP COMPANY, and
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

v.

DOUGLAS M. COSTLE, Administrator,
Environmental Protection Agency,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Reply Memorandum for Petitioners

In its Memorandum for the Respondent dated January, 1980, the United States reaffirmed its position, expressed earlier in the joint petition for rehearing to the court of appeals, that the jurisdictional ruling below was erroneous. Although the Memorandum for the Respondent does not oppose granting the writ of certiorari, the United States suggests summary reversal based on its view that the deci-

sion below is not important to future jurisdictional review issues involving Environmental Protection Agency ("EPA") permit actions. While petitioners do not necessarily oppose summary disposition, it should be noted that the premise on which the United States makes its suggestion is erroneous.

The United States' position is based upon the 1977 Amendments to the Clean Water Act, § 402(d)(4). This section now provides that, after an EPA veto of a state-issued NPDES permit, EPA may proceed to issue the permit under certain circumstances. 33 U.S.C. § 1342(d)(4) (Supp. I 1977). The Solicitor General argues that this amendment evidences a congressional intent to make EPA vetoes an unreviewable predicate to EPA issuance of a permit. Thus, according to the United States, the question of which court would review an EPA veto is of little future significance. Memorandum for the Respondent, pp. 7-8.

It should be noted, of course, that this portion of the 1977 Amendments does not apply to this case. Section 402(d)(4) by its terms requires that the veto have occurred after December 27, 1977 in order for EPA to have subsequent permit granting authority. The EPA veto in question here occurred on September 15, 1977. *In re Louisiana Pacific Corp.*, 10 ERC 1841 (1977) (Decision of the Administrator) (Appendix D to Petition for Writ of Certiorari, p. 24).

Petitioners also disagree with respondent's thinly supported assertion that the decision below is of little future importance. Variances based upon "fundamentally different factors" will continue to be available with respect to 1984 standards in most industries, *e.g.*, 44 Fed. Reg. 38746, 38763 (July 2, 1979), and may be assumed to spawn future litigation, thus demonstrating the importance of clear jurisdictional rules. Moreover, the contention by the Solicitor General that EPA vetoes of such variances will never be a reviewable, final agency action is wrong. The argument fails to consider the strong presumption of reviewability, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), let alone suggest "clear and convincing evidence" of a congressional intent to preclude review. *Id.* The Memorandum cites nothing in the Clean Water Act or its legislative history that suggests that Congress intended to shield EPA variance vetoes from judicial scrutiny. Since variance vetoes will likely be reviewed in the future just as in the past, clear jurisdictional standards are essential.*

*The United States' claim of unreviewability also conflicts with the position taken earlier in their joint petition for rehearing to the court of appeals at page 15, where they stated:

> Under the 1977 Amendments, where the Administrator has vetoed a permit and the State does not revise the permit to meet the Administrator's objections, the Administrator may then issue a revised permit. Section 402(d)(4) of the Act, 33 U.S.C. § 1342(d)(4), *as amended by* 91 Stat. 1599. The panel's opinion would make the Administrator's *veto* of the state-granted permit reviewable only in the District Court. However, if the EPA later *issued* a revised permit, that action would only be reviewable in the Court of Appeals. Thus, review of a single permit request involving identical parties and an identical record would be bifurcated. (emphasis in original).

Clearly this passage suggests the reviewability of EPA permit vetoes even after the 1977 Amendments.

Accordingly, the future importance of clear and concise jurisdictional rules is not diminished by the 1977 Amendments. To the contrary, it is both necessary and appropriate for clarification to occur at this time, and the petition for certiorari should be granted.

Dated: January 31, 1980.

Respectfully submitted,

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